

No. 97-2048-CFX

Title: William D. O'Sullivan, Petitioner
v.
Darren Boerckel

Docketed:
June 19, 1998

Court: United States Court of Appeals for
the Seventh Circuit

Entry Date

Proceedings and Orders

Jun 17 1998	Petition for writ of certiorari filed. (Response due July 19, 1998)
Jul 20 1998	Waiver of right of respondent Darren Boerckel to respond filed.
Jul 22 1998	DISTRIBUTED. September 28, 1998
Sep 3 1998	Response requested.
Oct 5 1998	Brief of respondent Darren Boerckel in opposition filed.
Oct 5 1998	Motion of respondent for leave to proceed in forma pauperis filed.
Oct 21 1998	REDISTRIBUTED. November 6, 1998
Nov 9 1998	REDISTRIBUTED. November 13, 1998
Nov 16 1998	Motion of respondent for leave to proceed in forma pauperis GRANTED.
Nov 16 1998	Petition GRANTED. limited to the following question: May an individual who is in custody pursuant to a state criminal conviction pursue claims in a federal habeas petition if those claims were not raised on direct appeal in a petition for discretionary review to the state's highest court? SET FOR ARGUMENT March 30, 1999. *****
Nov 20 1998	Application (A98-421) for a stay of proceedings, submitted to Justice Stevens.
Nov 20 1998	Application (A98-421) granted by Justice Stevens.
Dec 30 1998	Joint appendix filed.
Dec 30 1998	Brief of petitioner William O'Sullivan filed.
Jan 28 1999	Brief of respondent Darren Boerckel filed.
Feb 11 1999	CIRCULATED.
Feb 24 1999	Record filed.
Feb 25 1999	Record filed.
Mar 1 1999	Reply brief of petitioner William O'Sullivan filed.
Mar 30 1999	ARGUED.

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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WILLIAM D. O'SULLIVAN,

Petitioner,

v.

DARREN BOERCKEL,

Respondent.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit conflicts with decisions of this Court, including *Coleman v. Thompson*, 501 U.S. 736 (1991), *Harris v. Reed*, 489 U.S. 255 (1989), and *Teague v. Lane*, 489 U.S. 288 (1989).

2. Whether the decision of United States Court of Appeals for the Seventh Circuit is contrary to the approach taken by a majority of the Circuit Courts.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
I.	
<i>Certiorari</i> Should Be Granted Because The Seventh Circuit's Holding Conflicts With The Principle That Exhaustion Is Based On Federal Notions Of Comity Rather Than The State Court's Procedural Rules	6
II.	
<i>Certiorari</i> Should Be Granted Because The Seventh Circuit's Holding Conflicts With The Decisions Of A Majority Of The Circuit Courts of Appeals	14
CONCLUSION	19
APPENDIX	<i>infra</i>

TABLE OF AUTHORITIES

	PAGE(S)
<i>United States Supreme Court Cases</i>	
<i>Boerckel v. Illinois</i> , 447 U.S. 911 (1980)	2
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	3
<i>Castille v. Peoples</i> , 489 U.S. 346 (1989)	18
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	i, 7, 8, 9, 10
<i>Ex parte Royall</i> , 117 U.S. 241 (1886)	15
<i>Harris v. Reed</i> , 489 U.S. 255 (1989)	i, 9, 17
<i>Jones v. Barnes</i> , 463 U.S. 745 (1982)	13
<i>Lindh v. Murphy</i> , 521 U.S. ___, 117 S.Ct. 2059 (1997)	4
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982)	7, 14, 15, 17, 18
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	3
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	i, 9
<i>Ylst v. Nunnemaker</i> , 501 U.S. 797 (1991)	7

Other Cases

<i>Boerckel v. O'Sullivan</i> , 135 F.3d 1194 (7th Cir. 1998)	5, 6, 10
<i>Buck v. Green</i> , 743 F.2d 1567 (11th Cir. 1984) ..	16
<i>Caswell v. Ryan</i> , 953 F.2d 853 (3d Cir. 1992) ...	16
<i>Dolny v. Erickson</i> , 32 F.3d 381 (8th Cir. 1994)	10, 11, 12, 16
<i>Dulin v. Cook</i> , 957 F.2d 758 (10th Cir. 1992) ...	15
<i>Grey v. Hoke</i> , 933 F.2d 117 (2d Cir. 1991)	15
<i>Hogan v. McBride</i> , 74 F.3d 144 (7th Cir. 1996)	7, 18
<i>Jennison v. Goldsmith</i> , 940 F.2d 1308 (9th Cir. 1991)	15
<i>Lindh v. Murphy</i> , 96 F.3d 856 (7th Cir. 1996)	4
<i>McNeeley v. Arave</i> , 842 F.2d 230 (9th Cir. 1988)	15
<i>Nutall v. Greer</i> , 764 F.2d 462 (7th Cir. 1985) ..	3, 7
<i>People v. Boerckel</i> , 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th Dist. 1979)	2
<i>People v. Henderson</i> , 215 Ill. App. 3d 24, 574 N.E.2d 268 (5th Dist. 1991)	13

<i>Richardson v. Procnier</i> , 762 F.2d 429 (5th Cir. 1985)	15
<i>Silverburg v. Evitts</i> , 993 F.2d 124 (6th Cir. 1993)	15
<i>Townsend v. Commissioner</i> , No. 94-1270, 1994 U.S. App. LEXIS 9750, at *2 (1st Cir. May, 1994)	16

Federal Statutes

28 U.S.C. § 1291	2
28 U.S.C. § 2253	2
28 U.S.C. § 2254	2, 4, 5, 6, 10

Additional Authority

Note, <i>Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting</i> , 79 MINN. L. REV. 1197 (1995) (authored by Matthew L. Anderson)	11, 12, 16, 17
Don R. Sampen, <i>Defendant fails to preserve federal claim</i> , <i>Chicago Daily Law Bulletin</i> , June 3, 1997 at 6, col. 2	13
Supreme Court of Illinois Rule 315(b)	10

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on February 9, 1998.

OPINION BELOW

The February 9, 1998, decision of the United States Court of Appeals for the Seventh Circuit is published at 135 F.3d 1194 (7th Cir. 1998). This decision is reprinted in the appendix to this petition. The March 20, 1998 order of the Seventh Circuit, denying O'Sullivan's Petition for Rehearing with Suggestions for Rehearing *en banc*, is reported at 1998 U.S. App. LEXIS 6150 (7th Cir. March 20, 1998), and reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on February 9, 1998, and rehearing was denied on March 20, 1998. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Central District of Illinois, Springfield Division asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit's jurisdiction was founded upon 28 U.S.C. §§ 1291 and 2253.

Boerckel had appealed from a final judgment of the district court denying his petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Boerckel had previously been convicted of rape, burglary, and aggravated battery pursuant to a 1977 state court judgment following a jury trial. Boerckel was sentenced to concurrent terms of imprisonment of 20 to 60, 5 to 15, and 2 to 6 years, respectively. His convictions and sentences were affirmed on direct appeal to the Illinois Appellate Court, Fifth District on January 10, 1979. See *People v. Boerckel*, 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th Dist. 1979). And on May 31, 1979, the Illinois Supreme Court denied his petition for leave to appeal. Boerckel filed a petition for *certiorari* which was also denied. See *Boerckel v. Illinois*, 447 U.S. 911 (1980).

On September 26, 1994, Boerckel filed a *pro se* petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of Illinois. The court subsequently appointed counsel and an amended petition was filed on March 15, 1995. The amended petition raised the following six issues: (1) whether Boerckel knowingly and intelligently waived his *Miranda* rights; (2) whether his confession was involuntary; (3) whether the evidence against him was insufficient to support a guilty verdict; (4) whether his confession was the fruit of an illegal

arrest; (5) whether he received the ineffective assistance of both trial and appellate counsel; and (6) whether the prosecution violated his right of discovery under *Brady v. Maryland*, 373 U.S. 83 (1963).

The district court entered an order on November 15, 1995 dismissing the fourth ground of the petition on the merits as barred by *Stone v. Powell*, 428 U.S. 465 (1976). The court also held that Boerckel procedurally defaulted on the fifth ground, since it was never raised on direct appeal to any state court, but that the sixth ground was properly presented and should be addressed on the merits. Finally, the court determined that Boerckel had procedurally defaulted on the first, second, and third grounds under *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985), because these grounds were not included in the petition for leave to appeal to the Illinois Supreme Court. These grounds were deemed procedurally barred because the time period in which Boerckel could have raised them to the Illinois Supreme Court had passed.

After these initial rulings, the district court requested additional briefing. Specifically, the court asked Boerckel to address the issue of cause for or prejudice from his procedural defaults on the first, second, third, and fifth grounds. The court also directed the State to respond to the merits of Boerckel's petition, which it had not done in its initial response. Boerckel did not articulate any cause for his procedural defaults. Instead, he argued that the court could hear his claims under the actual innocence or fundamental miscarriage of justice exception to the rule of procedural default.

On July 24, 1996, the court set the matter for hearing. At the hearing, Boerckel presented witnesses who

testified that, in the years since his conviction, two men have made statements that they committed the rape for which Boerckel was convicted.

On October 28, 1996, the district court found that the recent amendments to 28 U.S.C. § 2254 prohibited an evidentiary hearing¹ and that the court must ignore the evidence presented at trial. The court added, however, that even if it believed the witnesses, their testimony would establish only that others were present at the time the crimes were committed, but not that Boerckel was not present. The district court further found that Boerckel had procedurally defaulted on his first, second, third, and fifth grounds for habeas corpus relief and that he failed to show cause for the default.

The district court denied the amended petition on October 28, 1996. Petitioner filed a notice of appeal on November 27, 1996. The district court subsequently denied a certificate of appealability. However, the United States Court of Appeals for the Seventh Circuit granted a certificate of appealability on April 2, 1997. Then, on February 9, 1998, a panel of the United States Court of Appeals for the Seventh Circuit reversed the district court's dismissal of Petitioner's habeas corpus petition and remanded for further proceedings. Specifi-

¹ When the district court made this determination, it relied on the Seventh Circuit's interpretation of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (holding that courts may apply the statute retroactively). This Court has subsequently reversed the Seventh Circuit's interpretation of this issue. See *Lindh v. Murphy*, 521 U.S. ___, 117 S.Ct. 2059 (1997).

cally, the court found that the exhaustion principle of 28 U.S.C. § 2254 does not require that a habeas corpus petitioner include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1202 (7th Cir. 1998). Based on this holding, the panel found it unnecessary to reach the question of whether the Illinois Supreme Court would find these claims procedurally barred because of its timing requirement. *Id.*

On March 9, 1998, O'Sullivan filed a petition for rehearing with suggestion for rehearing *en banc*. The petition was denied in an order dated March 20, 1998. No judge in active service requested a vote thereon, and all of the judges on the original panel voted to deny rehearing. The United States Court of Appeals for the Seventh Circuit issued its mandate on March 30, 1998.

On April 2, 1998, the district court issued an order indicating that the three issues which it had previously determined had been procedurally defaulted would need to be rebriefed. Accordingly, the district court ordered Boerckel to submit briefing on his asserted grounds for relief on or before April 17, 1998. O'Sullivan was directed to file his response on or before May 1, 1998.

On April 9, 1998, O'Sullivan filed a motion to stay this re-briefing pending the filing of the instant petition for writ of *certiorari*. The district court denied O'Sullivan's stay motion in an order dated April 20, 1998. Then, on May 8, 1998, the court directed Boerckel to submit briefing on the following three grounds for relief: (1) that he did not knowingly and intelligently waive his *Miranda* rights; (2) that his confession was involuntary; and (3) that the evidence against him was insuffi-

cient to support a jury verdict. O'Sullivan was directed to file his response on or before June 5, 1998.²

Petitioner seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

***Certiorari* Should Be Granted Because The Seventh Circuit's Holding Conflicts With The Principle That Exhaustion Is Based On Federal Notions Of Comity Rather Than The State Court's Procedural Rules.**

The Seventh Circuit reversed the district court's dismissal of Petitioner's habeas petition and remanded for further proceedings. Specifically, it found that the exhaustion principle of 28 U.S.C. § 2254 does not require that a habeas corpus petitioner include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1202 (7th Cir. 1998). Based on this holding, the Seventh Circuit found it unnecessary to reach the question of whether the Illinois Supreme Court would find these claims procedurally barred because of its timing requirement. *Id.*

On appeal, O'Sullivan argued that the district court correctly determined that Boerckel had procedurally de-

² O'Sullivan's Response to Boerckel's Briefing Following Remand was filed in the United States District Court for the Central District of Illinois on June 3, 1998.

faulted three of the claims raised in his federal habeas petition for failing to present these claims in his petition for leave to appeal to the Illinois Supreme Court. O'Sullivan acknowledged the Seventh Circuit's decision in *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996), which suggested that this Court's decisions including *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) and *Coleman v. Thompson*, 501 U.S. 722 (1991) had invalidated prior caselaw in the Seventh Circuit requiring a habeas petitioner to seek review in the state's highest court on pain of forfeiture. *See Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985). However, O'Sullivan urged the Seventh Circuit that a more careful reading of *Coleman* should require a contrary finding.

The *Coleman* Court discussed that, in the habeas context, application of the independent and adequate state law doctrine is grounded in concerns of comity and federalism. *Coleman*, 501 U.S. at 730. Moreover, the Court noted that when the independent and adequate state ground supporting a habeas petitioner's custody is a state procedural default, an additional concern comes into play, the exhaustion requirement. *Id.* at 731. Since exhaustion is also grounded in concerns of comity, this means that in a federal system, the states should have the first opportunity to address and correct alleged violations of state prisoners' federal rights. *Id.* (citing *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). The Court concluded that the same concerns apply to both exhaustion and procedural default. *Coleman*, 501 U.S. 731. It reasoned:

Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas peti-

tioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. See 28 U.S.C. § 2254(b); *Engle v. Isaac*, 456 U.S. 107, 125-126, n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982). In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interests in correcting their own mistakes is respected in all federal habeas cases.

Id. at 732.

Thus, *Coleman* recognized the subtle interplay between the concepts of exhaustion and procedural default. But more importantly, the *Coleman* Court reaffirmed the necessity of giving state courts the first opportunity to address allegations of constitutional error concerning state court convictions.

Much of the *Coleman* Court's discussion focused on the difficulty of crediting state court decisions since it is often unclear if the state law analysis was independent of federal law. The Court concluded that in ambiguous cases, federal courts may address the merits of the habeas petition if the decision of the last state court to which the petitioner presented his claims fairly appears to have rested primarily on federal law in resolution of

those claims, or to have been interwoven with federal law, and does not clearly and expressly rely on an independent and adequate state ground. *Coleman*, 501 U.S. at 735. However, the Court stated that this rule does not apply in cases where the petitioner failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. *Id.* at 735 n.1. "In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.* (citing *Harris v. Reed*, 489 U.S. 255, 269-270 (1989) (O'Connor, J., concurring)); *Teague v. Lane*, 489 U.S. 288, 297-298 (1989).

The exception to the rule announced in *Coleman* is precisely the situation in the instant case. Here, Boerckel failed to raise three claims to the Illinois Supreme Court which he subsequently raised in his federal habeas corpus petition. The time for filing the claims had long since passed. See Supreme Court of Illinois Rule 315(b). Thus, Boerckel's failure to exhaust state court remedies when he failed to include the three claims in his petition for leave to appeal to the Illinois Supreme Court should have precluded the Seventh Circuit from remanding these three claims to the district court for a determination on the merits, since they had been procedurally defaulted.

The Seventh Circuit opinion here correctly notes that the key to evaluating this question requires a preliminary inquiry into whether Boerckel exhausted his state court remedies before any determination can be made

as to procedural default. *Boerckel*, 135 F.3d at 1199. It is precisely Boerckel's failure to exhaust, coupled with the fact that he no longer can exhaust, which ripens into a procedural default. See *Coleman*, 501 U.S. at 735 n.1.

The Seventh Circuit attempted to "solve[] the puzzle of how many chances a petitioner must give the state courts to review his claims" by turning to the language of 28 U.S.C. § 2254(c). *Boerckel*, 135 F.3d at 1199. However, in concluding that an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right (*id.* at 12), the Seventh Circuit has interpreted § 2254(c) too literally.

The Seventh Circuit's too literal interpretation seems to have been borne out of its improper reliance upon *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) (which stressed that "the right to raise" an issue referred to in § 2254 means more than a mere opportunity to seek leave to present an issue; it means a realistic, practical chance to present an issue and have it considered on the merits"), and a result-oriented analysis. Aside from *Dolny*, the Seventh Circuit found support for its conclusion from the fact that Illinois discourages litigants from raising every possible claim of error, which it incorrectly determined substantiated its conclusion that Illinois does not consider it necessary that petitioners raise all of their claims to exhaust their remedies. *Boerckel*, 135 F.3d at 1200. Additionally, the Seventh Circuit noted that Illinois recognizes that its Supreme Court practice is similar to this Court's *certiorari* procedure. *Id.* (citing Ill. S. Ct. R. 315 Comm.

Cmts). Reliance upon these factors led the Seventh Circuit to an erroneous conclusion.

The Eighth Circuit in *Dolny v. Erickson*, relied too heavily on the limited availability of relief in the state's supreme court. *Dolny*, 32 F.3d at 384 (stating that a prisoner's right of review in the state supreme court was "unquestionably restricted" because the state court grants less than 25% of all petitions for review, including non-habeas petitions). After reviewing the Minnesota Supreme Court's statistical record, the Eighth Circuit characterized the Minnesota Supreme Court as unwilling to grant discretionary review of habeas petitions, and then declared that petitioning that state's supreme court is always unnecessary. *Id.* Because the availability of review in state supreme courts may fluctuate (due to changes in court rules, statutes, and even state constitutions), and because federal courts disagree about the state courts' degree of availability, the Eighth Circuit's reliance on the scarcity of discretionary review does not necessarily improve judicial efficiency, because the state supreme court could grant relief in some instances, thereby reducing the federal courts' workload. See Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1225 (1995) (authored by Matthew L. Anderson).

The *Dolny* court's decision also undermines notions of comity because it fails to balance other interests at stake in determining whether a federal court should exercise its discretion to review a technically exhausted petition. *Id.* Although the *Dolny* court considered the state court's interest in hearing habeas petitions gen-

erally, it failed to consider the state's interests in that particular case. *Dolny*, 32 F.3d at 384 (analyzing reasons why dismissing petition for failure to exhaust would burden the state supreme court, but failing to discuss any interest the state court may have in ruling on the merits of a prisoner's claims). The Eighth Circuit provided state prisoners a direct route to federal court that bypasses the state supreme court. *Id.* ("[W]hen a petitioner has presented his claims to the State's Court of Appeals, [he] need not . . . [seek] discretionary review prior to requesting federal habeas relief."). This direct route virtually obliterated any opportunity for the state supreme court to influence its state's habeas process or to increase protection of federal rights within the state, because it left state prisoners with little incentive to petition the state supreme court.³ See Note, *Requiring Unwanted Habeas*, *supra*, at 1225-26. In addition, a blanket rule declaring petitions to state supreme courts unnecessary for exhaustion purposes leaves the state courts with statutory authority to exercise discretion in granting review of habeas petitions from state prisoners, but without any practical opportunity to exercise that discretion. *Id.* at 1226. Furthermore, allowing prisoners to circumvent the state supreme court imme-

³ Of course, prisoners believing the state supreme court is more likely to provide relief than federal courts have an incentive to petition for discretionary review. Conventional wisdom, however, is that federal courts are more receptive to federal constitutional issues and exercise more independent judgment. See Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1022-24 (1985) (distinguishing the interests of federal and state judges).

diately reduces that court's influence over the state's intermediate courts of appeal. *Id.*

Moreover, the fact that the Illinois Supreme Court may discourage litigants from raising every possible claim cannot be equated with that court's tacit approval that criminal defendants need not petition for leave to appeal in order to exhaust their remedies. First, even on direct appeal, Illinois long has recognized the need to winnow frivolous claims of error from those which have merit. *People v. Henderson*, 215 Ill. App. 3d 24, 29, 574 N.E.2d 268 (5th Dist. 1991) (citing *Jones v. Barnes*, 463 U.S. 745 (1982) (holding that appellate counsel need not raise every non-frivolous issue on appeal)). Further, the fact that the Illinois Supreme Court encourages selective presentation of issues is consistent with the fact that federal habeas corpus is itself an extraordinary remedy. The district courts in the Seventh Circuit annually receive more than a thousand petitions for writs of habeas corpus, yet they grant only 1.5 percent of them. Don R. Sampen, *Defendant fails to preserve federal claim*, *Chicago Daily Law Bulletin*, June 3, 1997 at 6, col. 2.

Finally, there is an important distinction between requiring a prisoner to file a petition for writ of *certiorari* and requiring him to file a petition for leave to appeal for purposes of exhaustion. As has already been discussed, exhaustion is rooted in concerns of federalism and comity. This means that the state courts should be given the first opportunity to examine and correct errors of federal constitutional concern which result from state court convictions. Requiring a prisoner to file for *certiorari* does not advance these interests. However,

allowing the highest state court to review a state court conviction clearly does.

A "rigorously enforced total exhaustion rule" provides state courts with every possible opportunity to correct a constitutional error. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). Strict enforcement of the exhaustion requirement furthers the purposes of exhaustion, and promotes the various state, federal, and prisoner interests involved, by providing state courts with ample opportunity to correct constitutional violations and by ensuring consolidation of prisoners' multiple claims. The Seventh Circuit's holding here stands in stark contrast to well-settled principles of habeas review. Accordingly, *certiorari* should be granted.

II.

Certiorari Should Be Granted Because The Seventh Circuit's Holding Conflicts With The Decisions Of A Majority Of The Circuit Courts of Appeals.

The exhaustion doctrine in federal habeas corpus should be construed to require a petitioner to seek discretionary review of the claims in the state's highest court before presenting the claims in the federal court to promote the principle of comity. As this Court held in *Rose v. Lundy*:

Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.'

* * *

A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first

from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error.

455 U.S. 509, 518-19 (1991) (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)).

The majority of the circuit courts of appeals find that a federal claim is procedurally barred if a petitioner has failed to raise a claim before the state courts, and the time for filing in the state's highest court has lapsed. See *McNeeley v. Arave*, 842 F.2d 230, 231 (9th Cir. 1988) (finding a petitioner failed to properly exhaust his state remedies by neglecting to present a claim to the state's highest court on direct review, regardless of whether he is entitled to review as a matter of right); *Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) (finding a petitioner failed to properly exhaust his state remedies by neglecting to present a claim to the state's highest court on direct review, regardless of whether he is entitled to review as a matter of discretion); *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985) (holding a petitioner must seek discretionary review in the Texas Court of Criminal Appeals); *Dulin v. Cook*, 957 F.2d 758, 759 (10th Cir. 1992) (holding that habeas petitioner's failure to seek discretionary review of claim in Utah Supreme Court procedurally bars him from federal habeas review); *Grey v. Hoke*, 933 F.2d 117, 119 (2d Cir. 1991) (holding that a petitioner must present his federal constitutional claims to the highest court of the state before a federal court may consider the merits of the petition); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993) (dismissing, with prejudice, federal habeas petition because petitioner did not exhaust his state law remedies by presenting

claim to Kentucky Supreme Court and further holding that petitioner would be procedurally barred from presenting the claim to the Kentucky Supreme Court); *Townsend v. Commissioner*, No. 94-1270, 1994 U.S. App. LEXIS 9750, at *2 (1st Cir. May, 1994) (unpublished opinion holding that a habeas petitioner's failure to appeal the denial of his state habeas petition to the New Hampshire Supreme Court constitutes a procedural default rather than a failure to exhaust state remedies); *Caswell v. Ryan*, 953 F.2d 853, 861 (3d Cir. 1992) (holding that petitioner's failure to raise claim of ineffective assistance of counsel in *nunc pro tunc* petition to the Pennsylvania Supreme Court constituted a procedural default of the claim in federal court); *but see Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (for purposes of § 2254, Georgia defendant who lost appeal as of right need not petition the Georgia Supreme Court for *certiorari*, given that court's limited jurisdiction); *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) (holding that, in light of the limited jurisdiction of the Minnesota Supreme Court, a petitioner need not request discretionary review prior to requesting federal habeas relief).

A rule declaring petitions for discretionary review to state supreme courts unnecessary for exhaustion purposes would virtually obliterate any opportunity for a state's highest court to protect federally secured rights because it would leave state prisoners with little incentive to petition state supreme courts. Furthermore, allowing state prisoners to circumvent the state's supreme court immediately reduces that court's influence over the state's lower level appellate courts. *See Note, Requiring Unwanted Habeas Corpus Petitions to State*

Supreme Courts for Exhaustion Purposes: Too Exhausting, 79 MINN. L. REV. 1197, 1225-26 (1995) (authored by Matthew L. Anderson).

Requiring exhaustion of state court remedies furthers state court interests by insuring that state courts retain a role in interpreting and enforcing federal law, by protecting the federal and state judicial systems from unnecessary friction, and by promoting finality of state court judgments. *See Rose*, 455 U.S. at 518. In addition, by requiring state habeas petitioners to bring federal claims in state courts, the exhaustion requirement encourages state courts to become familiar with and knowledgeable about federal law. *Id.* at 519.

This Court also intended the exhaustion doctrine to increase judicial efficiency. *Harris*, 489 U.S. at 255, 269 (O'Connor, J., concurring); *Rose*, 455 U.S. at 519 (noting that state courts create complete factual records that facilitate federal review). By requiring exhaustion of state remedies, federal courts encourage state courts to make, develop, and document factual and legal findings involved in prisoners' petitions. *Harris*, 489 U.S. at 269 (O'Connor, J., concurring) (*citing Rose*, 455 U.S. at 518-19). In addition, requiring exhaustion fosters an orderly process for habeas appeals forcing prisoners to pursue all the remedies in one forum before pursuing remedies in another and by allowing prisoners to make only one transition between the two forums. Moreover, as prisoners work through the process, they may abandon habeas claims if state courts provide sufficient relief, or they may refine and clarify their habeas petitions through additional state court appeals, thereby reducing or eliminating the federal courts' duties. Judicial efficiency benefits state and federal courts as well as pris-

oners, who prefer to have their claims heard and resolved as quickly as possible. *See Rose*, 455 U.S. at 519-20.

The Seventh Circuit expressed concern in *Hogan* that defendants do not have a constitutional right to counsel on discretionary review, thus "treating an omission from a petition for a discretionary hearing as a conclusive bar to federal review under § 2254 could create a trap for unrepresented prisoners. . ." *Hogan*, 74 F.3d at 147. The Seventh Circuit's concern is unnecessary. Since a defendant on appeal to the Illinois Appellate Court is entitled to counsel as of right, any relevant claims regarding trial court error are appropriately raised on that appeal. An unrepresented prisoner on discretionary review has the benefit of being able to raise those claims previously alleged on direct appeal where he had counsel. Moreover, a prisoner may not raise a claim for the first time on discretionary review. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Requiring a prisoner to apply for discretionary review from the state supreme court, the approach embraced by a majority of the federal circuit courts of appeals, insures that the states have the opportunity to participate in the development of federal and constitutional law. This majority approach also favors the federal courts' interest in judicial efficiency. These important concerns, upon which the doctrine of exhaustion is rooted, should encourage this Court to grant *certiorari* in order to align the Seventh Circuit's approach with that of a majority of the federal circuit courts of appeals.

CONCLUSION

For the aforementioned reasons, Petitioner, William D. O'Sullivan, respectfully requests this Court to find that: (1) the United States Court of Appeals for the Seventh Circuit's decision below conflicts with the principle that exhaustion is based on federal notions of comity rather than the state court's procedural rules, and (2) the Seventh Circuit's analysis so conflicts with the decisions of a majority of the circuit courts of appeals as to compel the Court to grant *Certiorari* either by plenary consideration or summary reversal.

Respectfully submitted,

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APPENDIX

App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4068

DARREN E. BOERCKEL,

Petitioner-Appellant,

v.

WILLIAM D. O'SULLIVAN,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 94 C 3258—**Richard Mills**, Judge.

ARGUED OCTOBER 20, 1997—DECIDED FEBRUARY 9, 1998

Before BAUER, FLAUM, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. This is a case about comity. Boerckel raises claims in his petition for habeas corpus that he raised in his direct appeal to the Appellate Court of Illinois but that he did not include in his petition for leave to appeal to the Illinois Supreme Court. The district court dismissed these claims as procedurally barred. Between the district court's order and oral argument, this Court revised its approach to this issue in *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996), and *Gomez v. Acevedo*, 106 F.3d 192 (7th Cir.), *vacated on other grounds*, ___ U.S. ___, 118 S. Ct. 37 (1997). After considering this subsequent change in our view, we reverse and remand.

I. HISTORY

In 1976, law enforcement authorities in Montgomery County, Illinois questioned several young men about an incident of rape, burglary, and aggravated battery involving an 87-year-old woman. One of those young men was the petitioner, Darren Boerckel. At the time, Boerckel was a 17-year-old boy with an IQ of approximately 70 and a long-standing reading defect. *See People v. Boerckel*, 385 N.E.2d 815, 821, 824 (Ill. App. Ct. 1979).

After Boerckel received his *Miranda* warnings, the police questioned him for two hours. Promising to take him to see his girlfriend when they were finished, the police obtained a signed confession. One of the officers wrote the confession using the same or similar words to those of Boerckel because Boerckel indicated that he did not write very well. *See id.* at 819. Boerckel was subsequently charged with rape, burglary, and aggravated battery. *See id.* at 817.

Before trial, Boerckel's attorney unsuccessfully attempted to suppress the confession. At trial, prosecutors presented the confession and the fact that Boerckel has the same blood type as the rapist as evidence. A jury convicted Boerckel on all three charges. *See id.* at 818.

Boerckel appealed his conviction to the Appellate Court of Illinois. He argued that the trial court erred in denying his motion to suppress because the confession was fruit of an illegal arrest, he did not receive his *Miranda* warnings properly, and he confessed involuntarily. Boerckel also claimed that the court erred in admitting certain evidence, denying his motion for discovery, denying his motion for a directed verdict since there was insufficient evidence to sustain a conviction, and denying his motion for mistrial because of prosecutorial misconduct. That court affirmed the conviction in a split decision. *See id.* at 824.

Boerckel then filed a petition for leave to appeal to the Illinois Supreme Court, raising only three issues. He questioned whether he was under arrest before he gave incriminating statements, whether prosecutorial misconduct

denied him a fair trial, and whether he was improperly denied discovery. The petition was denied. The United States Supreme Court also denied his petition for *certiorari*. *See Boerckel v. Illinois*, 447 U.S. 911 (1980).

On September 26, 1994, Boerckel filed a *pro se* petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of Illinois. The court appointed counsel on January 31, 1995, and an amended petition was filed on March 15, 1995. The amended petition raised the following issues: 1) whether Boerckel knowingly and intelligently waived his *Miranda* rights; 2) whether his confession was involuntary; 3) whether the evidence against him was insufficient to support a guilty verdict; 4) whether his confession was the fruit of an illegal arrest; 5) whether he received ineffective assistance of both trial and appellate counsel; and 6) whether the prosecution violated his right of discovery under *Brady v. Maryland*, 373 U.S. 83 (1963).

The district court entered an order on November 15, 1995 dismissing the fourth ground of the petition on the merits as barred by *Stone v. Powell*, 428 U.S. 465 (1976). The court also held that Boerckel procedurally defaulted on the fifth ground since it was never raised on direct appeal to any state court but that the sixth ground was properly presented and should be addressed on the merits. Finally, the court determined that Boerckel had procedurally defaulted on the first, second, and third grounds under *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985), because these grounds were not included in the petition for leave to appeal to the Illinois Supreme Court. These grounds were procedurally barred because the time period in which Boerckel could have raised them to the Illinois Supreme Court had passed.

After these initial rulings, the court requested additional briefing. Specifically, the district court asked Boerckel to address the issue of cause for or prejudice from his procedural defaults on the first, second, third, and fifth grounds. The court also directed the State to respond to the merits of Boerckel's petition, which it had not done in its initial re-

App. 4

sponse. Boerckel did not articulate any cause for his procedural defaults. Instead, he argued that the court may hear his claims under the actual innocence or fundamental miscarriage of justice exception to the rule of procedural default.

On July 24, 1996, the court set the matter for hearing. At the hearing, Boerckel presented witnesses who testified that, in the years since his conviction, two men have made statements that they committed the rape for which Boerckel was convicted.

On October 28, 1996, the district court found that the recent amendments to 28 U.S.C. § 2254 prohibited an evidentiary hearing¹ and that the court must ignore the evidence presented at the trial. The court added, however, that even if it believed the witnesses, it would only establish that others were present, not that Boerckel was not present. The district court further found that Boerckel had procedurally defaulted on his first, second, third, and fifth grounds for habeas corpus relief and that he failed to show cause for the default.

Boerckel appealed to this Court.

II. ANALYSIS

The sole issue in this appeal is whether, by failing to raise claims in his petition for leave to appeal to the Illinois Supreme Court, Boerckel procedurally defaulted on his claims that 1) he did not knowingly and intelligently waive his *Miranda* rights, 2) his confession was involuntary, and

¹ When the district court made this determination, it relied on this Court's interpretation of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (holding that courts may apply the statute retroactively). The Supreme Court has subsequently reversed our interpretation of this issue. See *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059 (1997). On remand, the district court should apply § 2254 as it existed before these amendments.

App. 5

3) the evidence against him was insufficient to support a guilty verdict.

A.

Before a federal court may address the merits of a § 2254 habeas petition, a petitioner must provide the state courts with a full and fair opportunity to review his claims. See *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Farrell v. Lane*, 939 F.2d 409, 410 (7th Cir. 1991). In particular, a petitioner must exhaust his state remedies, see 28 U.S.C. § 2254(b), (c), and avoid procedurally defaulting his claims during the state court proceedings, see *United States ex rel. Simmons v. Gramley*, 915 F.2d 1128, 1132 (7th Cir. 1990). The doctrines of exhaustion and procedural default both "involve situations in which a failure to present a claim in the state courts bars the granting of federal habeas corpus relief in the federal courts." See James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 23.1 n.9 (1988 & supp. 1993). The doctrines, however, are distinct and have different ramifications.

1.

The exhaustion doctrine is an ordering device. In *Ex Parte Royall*, 117 U.S. 241 (1886), the Supreme Court held that federal courts should not, for reasons of comity and deference to state courts, entertain a claim in a habeas corpus petition until after the state courts have had an opportunity to hear the matter. See *id.* at 252-53. Subsequently incorporated into the habeas statute, the doctrine states that individuals in state government custody may bring a habeas corpus petition only if they have exhausted the remedies available in state court or "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights" of that individual. 28 U.S.C. § 2254(b). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he

has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

Read narrowly, this language appears to prevent federal courts from concluding that a petitioner has exhausted his remedies if there exists any possibility of further state court review. The Supreme Court has expressly rejected this interpretation. See *Brown v. Allen*, 344 U.S. 443, 447, 448-49 n.3 (1953) (holding that the exhaustion doctrine does not require habeas petitioners to seek state collateral relief based upon the same evidence and issues once the state courts have already ruled on the claim on direct review). Instead, federal court review is delayed until the state has had a chance to correct any errors in its law or procedures. See, e.g., *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (*per curiam*) (stressing that exhaustion requirement allows state courts an "initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights") (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)).

Thus, the exhaustion doctrine allows the state court system to decide the merits of the claim first. An exhaustion question is only one of timing, not jurisdiction. It determines not whether but when a federal court will consider a habeas corpus petition. See *Fay*, 372 U.S. at 418 ("This qualification plainly stemmed from considerations of comity rather than power, and envisaged only the postponement, not the relinquishment, of federal habeas corpus jurisdiction."); see also Matthew L. Anderson, Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 Minn. L. Rev. 1197, 1201-02 (1995).

2.

The failure to use available state procedures, however, likely will prevent federal habeas corpus relief, not because of exhaustion problems, but rather because the petitioner will have forfeited his claim by violating a state procedural rule. See Liebman & Hertz, *supra*, § 23.1 n.9.

The doctrine of procedural default bars federal habeas review when a state court declines to address a prisoner's federal claims because the defendant has not met a state procedural requirement. See *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); see also *Ulster County Court v. Allen*, 442 U.S. 140, 148 (1979); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a default occurs, federal relief is foreclosed because the default constitutes an independent and adequate state ground on which the decision rests. See Liebman & Hertz, *supra*, § 23.1 n.9.

On both direct review and habeas review, the Supreme Court has held that it will not consider an issue of federal law from a judgment of a state court if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. See *Harris v. Reed*, 489 U.S. 255, 260 (1989); see also *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-36 (1875). Without the independent and adequate state ground doctrine, habeas petitioners would be able to avoid the exhaustion requirement by failing to satisfy a state's procedural rules, rendering the defaulted state remedies unavailable. See *Coleman*, 501 U.S. at 732. Thus, "[t]he independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases," *id.*, by requiring petitioners to satisfy a state's procedural rules and exhaust their state remedies or face the penalty of having their claims barred from federal habeas review.

B.

When the district court heard Boerckel's petition, this Court believed that a federal habeas petitioner forfeited the right to habeas relief if he did not seek review in a state's highest court of all the claims presented in his habeas petition. See *Nutall v. Greer*, 764 F.2d 462, 463-64 (7th Cir. 1985); see also *Lostutter v. Peters*, 50 F.3d 392 (7th Cir.

App. 8

1995); *Jones v. Washington*, 15 F.3d 671, 675 (7th Cir. 1994); *Mason v. Gramley*, 9 F.3d 1345 (7th Cir. 1993). Then, in 1996, this Court revised its approach to the doctrine of procedural default.

1.

In *Hogan v. McBride*, this Court reconsidered whether a federal habeas petitioner forfeits a claim that is not included in a discretionary petition for transfer to the state's highest court. See 74 F.3d at 144. In *Hogan*, the petitioner did not include a confrontation claim in his discretionary appeal to Indiana's highest court, and the district court deemed this claim forfeited as a procedural default under *Wainwright*, 433 U.S. at 72. See *Hogan*, 74 F.3d at 145.

The Court evaluated whether Indiana law encourages petitioners to be selective in the presentation of their claims to the Indiana Supreme Court, recognizing that "[f]orfeiture under § 2254 is a question of a state's internal law: failure to present a claim at the time, and in the way, required by the state is an independent state ground of decision, barring review in federal court." *Hogan*, 74 F.3d at 146 (citing *Coleman*, 501 U.S. at 729-44; *Harris*, 489 U.S. at 244). After reviewing Indiana's appellate rules, it concluded that Indiana "discourages litigants from raising every possible claim of error, which implies that omission is not to be penalized." *Hogan*, 74 F.3d at 146. Thus, the Court concluded that "[t]he claim was not forfeited; it was resolved on the merits; and when the last state court to address a question reaches the merits without invoking a rule of forfeiture, the question is open on collateral review under § 2254." *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Coleman*, 501 U.S. at 732-35).

The Court also explained why *Nutall* and its progeny were erroneous. "*Nutall* was decided before the Supreme Court refined the forfeiture doctrine in *Harris*, *Coleman*, and *Ylst*. These opinions establish that § 2254 asks whether an independent and adequate state ground supports the

App. 9

decision. Forfeiture depends on state law" *Hogan*, 74 F.3d at 147. Thus, "[i]f the prisoner has presented his argument to the right courts at the right times—as the states define these courts and times—then the claim is preserved for federal collateral review." *Id.*

2.

In *Gomez v. Acevedo*, the Court applied its *Hogan* analysis to determine whether Gomez defaulted on a claim by not including it in his petition to the Illinois Supreme Court. See 106 F.3d at 196. After reviewing Illinois case law, the Court determined that a petition for leave to appeal "is not necessarily an adversary proceeding to which the application of . . . the doctrine of waiver . . . is appropriate." *Id.* (quoting *People v. Edgeworth*, 332 N.E.2d 716, 720 (Ill. App. Ct. 1975)). Also, the Court noted that a denial of leave to appeal "carr[ies] no connotation of approval or disapproval of the appellate court action." *Gomez*, 106 F.3d at 196 (quoting *People v. Vance*, 390 N.E.2d 867, 872 (Ill. 1979)). Thus, it concluded that Gomez did not procedurally default by failing to present a claim to the Illinois Supreme Court. See 106 F.3d at 196.

C.

O'Sullivan argues that this Court's analysis in *Hogan* and holding in *Gomez* are erroneous and that we should return to our previous view of procedural default and dismiss Boerckel's claims as defaulted. He claims that an exception exists to the general rule that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Coleman*, 501 U.S. at 735-36 (quoting *Harris*, 489 U.S. at 263). Specifically, O'Sullivan highlights a footnote in *Coleman* which states that this clear statement rule "does not apply if the petitioner failed to exhaust state remedies and the court to

which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." 501 U.S. at 735 n.1. In such a scenario, the Supreme Court reasoned that a procedural default exists "for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.*

O'Sullivan believes that the exception to the rule announced in *Coleman* is precisely the situation in this case. Boerckel did not raise three claims to the Supreme Court of Illinois that he raises in his habeas petition, and the time for filing a petition to that court has long passed. See Ill. S. Ct. R. 315(b). Thus, he contends that Boerckel procedurally defaulted by not presenting these claims to the Illinois Supreme Court.

1.

In *Hogan and Gomez*, this Court evaluated the state law of forfeiture to determine whether Indiana and Illinois penalized litigants for not including claims in petitions to the Indiana and Illinois Supreme Court. See 74 F.3d at 146; 106 F.3d at 196. By raising the question of whether Boerckel has exhausted his state remedies as a preliminary inquiry in determining whether Boerckel has procedurally defaulted, O'Sullivan has shifted the focus of our analysis. The critical issue in responding to O'Sullivan's argument is not whether the state court relied on a procedural rule to conclude that the petitioner procedurally defaulted on the claim. Rather, it is whether the petitioner's refusal to include all his claims in his petition for leave to appeal to the Illinois Supreme Court constitutes a failure to exhaust his state court remedies, which thereby bars him from raising them in his habeas petition under the doctrine of procedural default.

As we noted earlier, a petitioner exhausts his remedies when he provides the state courts with a full and fair opportunity to review his claims. See *Keeny v. Tamayo-Reves*,

504 U.S. 1, 10 (1992); *Picard*, 404 U.S. at 276. Even though O'Sullivan's argument alters our analysis, the result remains the same. We hold that the exhaustion requirement of § 2254 does not require a petitioner to include all of his claims in a petition for leave to appeal to the Illinois Supreme Court to exhaust his state remedies.²

2.

The key to solving the puzzle of how many chances a petitioner must give the state courts to review his claims lies in the language of § 2254. Section (c) provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c) (emphasis added). Codified in 1948, this section incorporated the common law on exhaustion. See *Rose*, 455 U.S. at 515; see also *Ex parte Hawke*, 321 U.S. 114, 116-17 (1944). The question, however, has always remained: "To what extent must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court?"

² Although we refuse O'Sullivan's invitation to stray from our established position, we note that other circuits are split on this issue. Compare *Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) (*per curiam*) (Petitioner must seek discretionary review in Arizona state courts; "the right to raise" an issue does not entail a right to have that issue considered on its merits.); *Grey v. Hoke*, 933 F.2d 117, 119 (2d Cir. 1991) (Petitioner must present claim to highest court of the state before a federal court may consider its merits.); and *Richardson v. Proconier*, 762 F.2d 429, 431-32 (5th Cir. 1985) (Petitioner must seek discretionary review in the Texas Court of Criminal Appeals.) with *Dolny v. Erickson*, 32 F.3d 381 (8th Cir. 1994) (Petitioner need not request discretionary review in Minnesota Supreme Court.); and *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (For purposes of § 2254, Georgia defendant who lost appeal as a matter of right, need not petition the Georgia Supreme Court for *certiorari*, given that court's limited jurisdiction.).

Castille v. Peoples, 489 U.S. 346, 349-50 (1989) (Scalia, J., for unanimous Court) (quoting *Wainwright*, 433 U.S. at 78) (emphasis added in *Castille*). We interpret the right to raise the question presented to mean more than simply the ability to present a question to a court and request an opportunity to be heard. See *Dolny*, 32 F.3d at 384 (stressing that "[t]he right . . . to raise" an issue referred to in § 2254 means more than a mere opportunity to seek leave to present an issue; it means a realistic, practical chance to present an issue and have it considered on the merits"); Liebman & Hertz, *supra*, § 23.4. We believe an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right.

3.

In Illinois, the right of a petitioner to have his claim considered by the Illinois Supreme Court is restricted. It is within the sound judicial discretion of the Illinois Supreme Court to decide whether to review the bulk of the decisions of the Appellate Court of Illinois. See Ill. S. Ct. R. 315(a); see also *Bowman v. Illinois Cent. Ry. Co.*, 142 N.E.2d 104 (Ill. 1957). In determining whether to grant a petition for leave to appeal, the court evaluates criteria which include "the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." Ill. S. Ct. R. 315(a); cf. *Hogan*, 74 F.3d at 146 (determining that Indiana's appellate rules are similarly constructed); *Dolny*, 32 F.3d at 384 (similar in Minnesota); *Buck*, 743 F.2d at 1569 (similar in Florida). The fact that Illinois discourages litigants from raising every possible claim of error is evidence that Illinois does not consider it necessary that petitioners raise all of their claims to exhaust their remedies.

Moreover, Illinois recognizes that its Supreme Court's practice is similar to the *certiorari* procedure in the United States Supreme Court. See Ill. S. Ct. R. 315 Comm. Cmts. The denial of a leave to appeal is not a decision on the merits of a case just like the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (plurality) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)); see also *People v. Vance*, 390 N.E.2d 867, 872 (Ill. 1979). In *Fay v. Noia*, the Supreme Court recognized that a petitioner's failure to timely seek *certiorari* in the Supreme Court does not bar a state prisoner from federal habeas relief. See 372 U.S. 391, 435 (1963), *overruled on other grounds by Coleman*, 501 U.S. at 748-51. To remain consistent with *certiorari* practice, Boerckel's decision not to include all of his claims does not bar him from federal habeas relief.

4.

Also, we can infer that a petitioner provides state courts with a fair presentation of his claim in his appeal as of right, not in a petition for leave to appeal. See *Wilwording*, 404 U.S. at 250.

In *Castille*, the Supreme Court held that a prisoner who raised an issue for the first time on a petition to the Pennsylvania Supreme Court for allocatur did not provide the state courts with "fair presentation" of the claim for purposes of the exhaustion requirement. See 489 U.S. at 351. Under Pennsylvania law, allocatur review is not a matter of right, but of sound judicial discretion, and an appeal is allowed only when there are special and important reasons. See Pa. R. App. Proc. 1114. The court concluded that raising a claim in a procedural context in which discretion exists to refuse to consider the merits does not constitute "fair presentation." See *Castille*, 489 U.S. at 351; see also *Cruz*, 907 F.2d at 669 (holding that a petitioner did not exhaust his state remedies by merely submitting a claim to the Illinois Supreme Court).

Then, in *Ylst*, the Supreme Court considered whether a state prisoner procedurally defaulted his habeas claims when an unexplained denial for state habeas corpus followed a rejection of the same claim by the state's appellate court on direct appeal. See 501 U.S. at 799. In concluding that the prisoner procedurally defaulted, the court reasoned that the prisoner "had exhausted his . . . claim by presenting it on direct appeal, and was not required to go to state habeas at all." *Id.* at 805.

Thus, if Boerckel must provide state courts with an opportunity to correct any alleged violation of his federal rights and a petition for leave to appeal does not constitute this opportunity, see *Castille*, 489 U.S. at 351, and Boerckel is not required to seek state habeas proceedings, see *Ylst*, 501 U.S. at 805, then a petitioner provides the state courts with the required opportunity in the petitioner's direct appeal as of right.

5.

Our holding is also consistent with the principles underlying the exhaustion requirement. Comity is the primary basis for the exhaustion requirement. See *Rose v. Lundy*, 455 U.S. 509, 515 (1982); *Hawk*, 321 U.S. at 117.

Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)); see also *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*) (noting that the exhaustion requirement "serves to minimize friction between our federal and

state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. Federal courts do not snatch claims from state courts when they review claims not included in discretionary petitions to state supreme courts. Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.

We also note that requiring petitioners to argue all of their claims to the state supreme court would turn federalism on its head. If a state has chosen a system that asks petitioners to be selective in deciding which claims to raise in a petition for leave to appeal to the state's highest court, we seriously question why this Court should require the petitioner to raise all claims to the state's highest court if he hopes to request habeas review. The exhaustion requirement of § 2254 does not require such a result.

Moreover, contrary to O'Sullivan's suggestion, this decision will not "obliterate any opportunity for a state's highest court to protect federally secured rights because it will leave state prisoners with little incentive to petition state supreme courts." Respondent Br. at 19. It is difficult to imagine that this holding will induce attorneys and defendants in state government custody to withhold an appropriate claim in a petition for leave to appeal to the state's highest court, knowing that it cannot hurt and could only potentially help their cause. O'Sullivan's argument assumes a remarkably risk-prone group of defendants and attorneys, especially given the fact that "the success rate at trial and on appeal, while low, is greater than the success rate on habeas corpus." See Judith Resnik, *Tiers*, 57 S. Cal. L. Rev. 837, 894 (1984). We do not believe that it accurately pre-

App. 16

dicts the effect our holding will have on the incentives to petition the Illinois Supreme Court.

Finally, we reiterate our concern that "[t]reating an omission from a petition for a discretionary hearing as a conclusive bar to federal review under § 2254 could create a trap for unrepresented prisoners, whose efforts to identify unsettled and important issues suitable for discretionary review would preclude review of errors under law already established." *Hogan*, 74 F.3d at 147.

We therefore hold that Boerckel exhausted his state remedies by including these claims in his direct appeal to the Appellate Court of Illinois. The exhaustion principle of § 2254 does not require him to include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. Thus, we do not need to reach the question of whether the Illinois Supreme Court would find these claims procedurally barred because of its timing requirement. For these reasons, we REVERSE the district court's dismissal of Boerckel's habeas petition and REMAND for further proceedings consistent with this decision.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

App. 17

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 20, 1998

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

DARREN E. BOERCKEL,
Petitioner-Appellant,

No. 96-4068 v.

WILLIAM D. O'SULLIVAN,
Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 94 C 3258—Richard Mills, *Judge*.

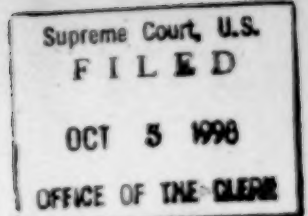
ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

NOW 6 PAGE 1

No. 97-2048



IN THE
—SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

WILLIAM D. O'SULLIVAN,
Petitioner,

vs.

DARREN BOERCKEL,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

NOW COMES the Respondent, DARREN BOERCKEL, by the undersigned appointed counsel, and pursuant to Rule 39.1 of this Court, respectfully requests leave to file the attached Brief in Opposition in forma pauperis.

Respondent is indigent and is incarcerated in the Illinois Department of Corrections at the Western Illinois Correctional Center. The undersigned counsel was appointed pursuant to 18 U.S.C. § 3006A to represent the respondent in both the United States District Court for the Central District of Illinois, Springfield Division, and the United States Court of Appeals for the Seventh Circuit.

13 PP

DARREN BOERCKEL,
Respondent

RICHARD H. PARSONS
Chief Federal Public Defender

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No. 97-2048

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

WILLIAM D. O'SULLIVAN,
Petitioner,

vs.

DARREN BOERCKEL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE ISSUE OF WHETHER RESPONDENT
PROCEDURALLY DEFAULTED HIS CLAIMS SHOULD BE REVIEWED
WHERE THE DISTRICT COURT ERRONEOUSLY APPLIED AEDPA
REQUIREMENTS TO RESPONDENT'S CLAIM OF ACTUAL INNOCENCE?
2. WHETHER STATE LAW REQUIRED RESPONDENT TO SEEK REVIEW OF
EACH AND EVERY CLAIM IN THE ILLINOIS SUPREME COURT IN ORDER
TO AVOID FORFEITURE OF THOSE CLAIMS?
3. WHETHER THIS COURT SHOULD ADOPT A UNIFORM RULE REGARDING
THE EFFECT OF FAILING TO INCLUDE A CLAIM IN A PETITION FOR
LEAVE TO APPEAL TO A STATE SUPREME COURT WHEN THE STATES DO
NOT HAVE UNIFORM RULES REGARDING SUCH PETITIONS?
4. WHETHER THE SEVENTH CIRCUIT WAS CORRECT IN DETERMINING
THAT ILLINOIS RULE WHICH DISCOURAGED LITIGANTS FROM RAISING
EVERY POSSIBLE CLAIM OF ERROR DID NOT REQUIRE THAT ALL
POSSIBLE CLAIMS BE RAISED ON PAIN OF FORFEITURE?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

REASONS FOR DENYING THE WRIT 2

 I. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE
 DISTRICT COURT'S ERRONEOUS APPLICATION OF THE AEDPA
 AMENDMENTS TO RESPONDENT'S CLAIM OF ACTUAL INNOCENCE
 CALLS FOR REMAND REGARDLESS OF THE DETERMINATION OF THE
 ISSUES PRESENTED IN PETITIONER'S BRIEF 2

 II. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE
 ILLINOIS LAW DOES NOT REQUIRE A DEFENDANT TO SEEK REVIEW OF
 EACH AND EVERY CLAIM IN THE ILLINOIS SUPREME COURT IN ORDER
 TO AVOID FORFEITURE OF THOSE CLAIMS 3

 III. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE LACK
 OF UNIFORMITY AMONG THE CIRCUITS ON THE EFFECT OF FAILING TO
 INCLUDE A CLAIM IN A PETITION FOR LEAVE TO APPEAL TO A STATE
 SUPREME COURT IS LOGICAL WHEN THE STATES DO NOT HAVE UNIFORM
 RULES REGARDING SUCH PETITIONS 4

 IV. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE
 SEVENTH CIRCUIT WAS CORRECT IN DETERMINING THAT THE ILLINOIS
 RULE WHICH DISCOURAGED LITIGANTS FROM RAISING EVERY POSSIBLE
 CLAIM OF ERROR DID NOT REQUIRE THAT ALL POSSIBLE CLAIMS BE
 RAISED ON PAIN OF FORFEITURE 6

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Boerckel v. O'Sullivan, 135 F.3d 1194 (7th Cir. 1998) 1-7

Buck v. Green, 743 F.2d 1567 (11th Cir. 1984) 6

Dolny v. Erickson, 32 F.3d 381 (8th Cir. 1994) 7,8

Harris v. Reed, 489 U.S. 255 (1989) 4

Lindh v. Murphy, 117 S.Ct. 2059 (1997) 2

People v. Boerckel, 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th
Dist. 1979) 2

People v. Edgeworth, 30 Ill. App. 3d 289, 332 N.E.2d 716 (1st
Dist. 1975) 3

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 2,3,7,8

RULES

Ill. S. Ct. R. 315(a) 4,5,6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

WILLIAM D. O'SULLIVAN,
Petitioner,

vs.

DARREN BOERCKEL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, decided on February 9, 1998, reversing the judgment of the district court that the first, second and third claims of Boerckel's habeas petition were procedurally defaulted was published. *Boerckel v. O'Sullivan*, 135 F.3d 1194 (7th Cir. 1998). The order denying Petitioner's petition for rehearing with suggestion for rehearing *en banc* was entered on March 20, 1998 and is included on page 17 of Petitioner's Appendix. The

decision of the district court on October 28, 1996 denying Boerckel's amended habeas petition was unpublished. The split-decision of the state appellate court affirming Boerckel's convictions was published. *People v. Boerckel*, 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th Dist. 1979).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit reversing the dismissal of Respondent's habeas petition was entered on February 9, 1998. On March 20, 1998, Petitioner's petition for rehearing with suggestion for rehearing *en banc* was denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DISTRICT COURT'S ERRONEOUS APPLICATION OF THE AEDPA AMENDMENTS TO RESPONDENT'S CLAIM OF ACTUAL INNOCENCE CALLS FOR REMAND REGARDLESS OF THE DETERMINATION OF THE ISSUES PRESENTED IN PETITIONER'S BRIEF.

In its decision remanding Boerckel's case for a determination of the first three claims of his habeas petition on the merits, the Seventh Circuit stated that the district court should apply 28 U.S.C. § 2254 as it existed prior to the AEDPA amendments, in accordance with *Lindh v. Murphy*, 117 S.Ct. 2059 (1997). *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1196 (7th Cir. 1998); Pet.App.4. The district court had previously ruled that it could not consider testimony regarding statements made by two

men that they had committed the rape for which Boerckel was convicted. Although the district court's order indicated that, "even if it believed the witnesses, it would only establish that others were present, not that Boerckel was not present," *id.*, that statement is simply dicta given the district court's previous determination that it could not consider the testimony. The fact that the Seventh Circuit observed that the pre-AEDPA version of § 2254 should be applied on remand indicates that the Seventh Circuit did not consider the district court's comment conclusive on the issue of whether actual innocence could be shown. Consequently, regardless of any determination of whether failing to present a claim to the Illinois Supreme Court is a procedural default, this case would have to be remanded to the district court making it an imperfect vehicle for the determination of the issues presented by the Petitioner.

II. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE ILLINOIS LAW DOES NOT REQUIRE A DEFENDANT TO SEEK REVIEW OF EACH AND EVERY CLAIM IN THE ILLINOIS SUPREME COURT IN ORDER TO AVOID FORFEITURE OF THOSE CLAIMS.

Illinois caselaw at the time of Boerckel's petition for leave to appeal to the Illinois Supreme Court and at present does not require that an issue be presented in a petition to the Illinois Supreme Court to avoid waiver. As the Seventh Circuit's opinion in this case discussed, *People v. Edgeworth*, 30 Ill. App. 3d 289, 294, 332 N.E.2d 716, 720 (1st Dist. 1975), stated that a petition for leave to appeal "is not necessarily an adversary

proceeding to which the application of ... the doctrine of waiver ... is appropriate." *Boerckel*, 135 F.3d at 1198; Pet.App.9.

III. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE LACK OF UNIFORMITY AMONG THE CIRCUITS ON THE EFFECT OF FAILING TO INCLUDE A CLAIM IN A PETITION FOR LEAVE TO APPEAL TO A STATE SUPREME COURT IS LOGICAL WHEN THE STATES DO NOT HAVE UNIFORM RULES REGARDING SUCH PETITIONS

Petitioner correctly points out that there is a conflict among the circuits regarding the effect of failing to include a claim in a petition for leave to appeal to a state supreme court. Petitioner argues that a rule requiring the presentation of all claims in a petition for discretionary review "would virtually obliterate any opportunity for a state's highest court to protect federally secured rights because it would leave state prisoners with little incentive to petition state supreme courts."

Pet.Brf.16. Petitioner also notes, citing *Harris v. Reed*, 489 U.S. 255, 269 (1989) (O'Connor, J. dissenting), that the exhaustion doctrine was intended to increase judicial efficiency. Pet.Brf.17.

Petitioner's brief ignores the fact that state rules regarding petitions to state supreme courts are not uniform. Although Petitioner's brief makes clear that most of the cases cited involved discretionary review by the highest state court, Petitioner does not discuss the criteria used by those states in the determination of whether to grant review. As the Seventh Circuit discussed in *Boerckel*, Ill. S. Ct. R. 315(a) states that

the criteria used by the Illinois Supreme Court in determining whether to grant a petition for leave to appeal include "the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." *Boerckel*, 135 F.3d at 1200; Pet.App.12. The Seventh Circuit also noted that the fact that Illinois discourages litigants from raising all possible claims was evidence that Illinois does not consider it necessary to raise all possible claims to comply with exhaustion requirements. *Id.*

The Seventh Circuit correctly observed that, contrary to Petitioner's contention, its holding would not obliterate any opportunity for a state's supreme court to protect federally secured rights since presenting a claim to the state's supreme court cannot hurt and could potentially help the defendant. *Boerckel*, 135 F.3d at 1202; Pet.Brf.15. Petitioner's argument that requiring the presentation to the Illinois Supreme Court of all possible claims, a practice Illinois Supreme Court Rule 315(a) seems to discourage, will aid judicial efficiency is without merit. Judicial efficiency would in fact be hampered by the position urged by the Petitioner.

The three claims at issue in Boerckel's appeal to the Seventh Circuit were: 1) whether he knowingly and intelligently waived his *Miranda* rights; 2) whether his confession was involuntary, and; 3) whether the evidence against him was insufficient to support a guilty verdict. *Boerckel*, 135 F.3d at 1196; Pet.App.4-5. Obviously, although important to the Respondent, these case-specific issues are not the type of issues Ill. S. Ct. R. 315(a) suggests the Illinois Supreme Court is likely to review. Presentation of the types of claims the Illinois Supreme Court is not interested in reviewing is simply a waste of resources for both the parties and the court. As the Eleventh Circuit has observed, the requirements of 28 U.S.C. § 2254 "are rooted in the doctrine of comity and should not be so construed as to burden the state system with meaningless petitions for relief to forums which are not intended by state law to consider them." *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984).

IV. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT WAS CORRECT IN DETERMINING THAT THE ILLINOIS RULE WHICH DISCOURAGED LITIGANTS FROM RAISING EVERY POSSIBLE CLAIM OF ERROR DID NOT REQUIRE THAT ALL POSSIBLE CLAIMS BE RAISED ON PAIN OF FORFEITURE

As discussed above, Ill. S. Ct. R. 315(a) discourages litigants from raising all possible claims in their petitions for leave to appeal. Illinois recognizes that its practice regarding petitions for leave to appeal is similar to this Court's

certiorari procedure. *Boerckel*, 135 F.3d at 1200; Pet.App.13.

"To remain consistent with certiorari practice, Boerckel's decision not to include all of his claims does not bar him from federal habeas relief." *Id.* As the Seventh Circuit noted in its opinion:

Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. ... Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.

Boerckel, 135 F.3d at 1201; Pet.App.15. As the Seventh Circuit correctly stated, the right to raise an issue referred to in 28 U.S.C. § 2254 means more than the right to request an opportunity to be heard, it means a realistic, practical chance to have the issue considered on the merits. *Boerckel*, 135 F.3d at 1200 (citing *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994)); Pet.App.12. Comity is not offended by the result reached by the Seventh Circuit. However, the result urged by the Petitioner, requiring defendants to include all possible claims in petitions for leave to appeal to the state supreme courts without regard to either the state's criteria for determining what issues to review or state caselaw on the effect of failing to include a claim in a petition for leave to appeal, would offend the principle of comity. "[C]oncerns of comity are best met by not requiring

fruitless and burdensome petitions." *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994).

Adoption of the position urged by Petitioner would also have the undesirable effect of encouraging counsel in Illinois to disregard the factors set forth in Ill. S. Ct. R. 315(a) in selecting issues to present in a petition for leave to appeal. This result comes about because, under the approach urged by the Petitioner, an attorney who did not present an arguable issue of the type discouraged by Ill. S. Ct. R. 315(a) would be waiving his client's rights and thereby providing ineffective assistance.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,
DARREN BOERCKEL, Respondent

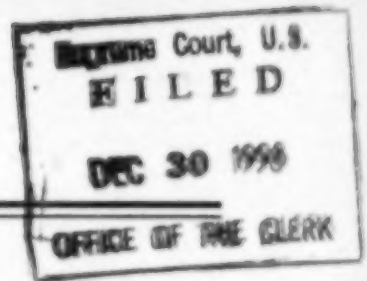
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7
No. 97 - 2048



IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

WILLIAM D. O'SULLIVAN,

v.

Petitioner,

DARREN BOERCKEL,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit**

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 17, 1998
CERTIORARI GRANTED NOVEMBER 16, 1998

4244

TABLE OF CONTENTS

	PAGE
Chronological List of Relevant Docket Entries	JA 1
Order of the United States District Court for the Central District of Illinois, Springfield Division, Entered October 28, 1996	JA 4
Opinion of the United States Court of Appeals for the Seventh Circuit, Decided February 9, 1998	JA 23
Order of the United States Court of Appeals for the Seventh Circuit, Decided March 20, 1998	JA 39

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

January 10, 1979 – Boerckel's convictions and sentences affirmed on direct appeal to the Illinois Appellate Court, Fifth District.

May 31, 1979 – The Illinois Supreme Court denies Boerckel's petition for leave to appeal.

June 9, 1980 – The Supreme Court denies Boerckel's petition for writ of *certiorari*.

September 26, 1994 – Boerckel files a *pro se* petition for writ of *habeas corpus* in the United States District Court for the Central District of Illinois, Springfield Division.

January 31, 1995 – District Court appoints counsel for Boerckel.

March 15, 1995 – Amended petition for writ of *habeas corpus* filed by counsel on Boerckel's behalf.

June 23, 1995 – O'Sullivan files an answer to the *habeas corpus* petition.

November 15, 1995 – District Court enters an order finding that Boerckel had procedurally defaulted three of his six claims for failure to include these claims among those raised before the Illinois Supreme Court on petition for leave to appeal. The District Court orders Boerckel to address cause and prejudice for his procedural defaults.

December 15, 1995 – Boerckel files supplemental pleading on procedurally defaulted claims

January 17, 1996 – O'Sullivan files brief in response to Boerckel's supplemental pleading

JA 2

October 28, 1996 – District Court issues order denying the amended *habeas corpus* petition.

November 25, 1996 – Boerckel files a motion for issuance of a certificate of appealability with the District Court.

November 27, 1996 – Boerckel files a notice of appeal from the denial of his *habeas corpus* petition with the District Court.

December 4, 1996 – District Court denies Boerckel's motion for issuance of a certificate of appealability.

December 16, 1996 – Boerckel files a motion for issuance of a certificate of appealability with the United States Court of Appeals for the Seventh Circuit.

April 2, 1997 – Court of Appeals grants request for certificate of appealability and sets briefing schedule.

October 20, 1997 – Oral argument heard and the Court of Appeals takes the matter under advisement.

February 9, 1998 – Court of Appeals reverses the District Court's dismissal of the habeas petition and remands for further proceedings.

March 9, 1998 – O'Sullivan files Petition for Rehearing with Suggestion for Rehearing *En Banc*.

March 20, 1998 – Court of Appeals enters order denying Petition for Rehearing with Suggestion for Rehearing *En Banc*.

March 30, 1998 – Court of Appeals issues its mandate.

June 17, 1998 – O'Sullivan files Petition for Writ of *Certiorari* in the United States Supreme Court.

June 19, 1998 – Case placed on Supreme Court docket.

JA 3

November 16, 1998 – United States Supreme Court enters order granting the Petition for Writ of *Certiorari*.

November 17, 1998 – O'Sullivan files an emergency motion for a stay of the proceedings pending before the District Court.

November 20, 1998 – Supreme Court enters order granting O'Sullivan's emergency motion for a stay of the proceedings pending before the District Court.

[Entered October 28, 1996]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

DARREN E. BOERCKEL,)	
)	
Petitioner,)	
v.)	No. 94-3258
)	
WILLIAM D. O'SULLIVAN,)	
)	
Respondent.)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Petitioner's amended petition for a writ of habeas corpus.

I. BACKGROUND

Darren E. Boerckel filed a petition for writ of habeas corpus pro se. After encountering difficulty understanding the allegations of the petition, the Court appointed counsel, who then filed an amended petition. In the amended petition, Boerckel states six potential grounds for relief:

- 1) That he did not knowingly and intelligently waive his *Miranda* rights;
- 2) That his confession was involuntary;
- 3) That the evidence against him was insufficient to support a guilty verdict;

- 4) That his confession was the fruit of an illegal arrest;
- 5) That he received ineffective assistance of both trial and appellate counsel; and
- 6) That his right to discovery under *Brady v. Maryland* was violated.

After ordering the State to respond to the petition, the Court issued a number of rulings. The Court rejected Boerckel's fourth ground for relief, finding it barred by the rule enunciated in *Stone v. Powell*, 428 U.S. 465 (1976). The Court also concluded that Boerckel's sixth ground for relief was not procedurally defaulted and should be addressed on the merits. Finally, the Court determined that the first, second, third, and fifth grounds were procedurally defaulted.

After its initial rulings, the Court requested further briefing. Specifically, the Court asked Boerckel to address the issues of cause for or prejudice from his procedural defaults on grounds one, two, three, and five. The Court also directed the State to respond to the merits of Boerckel's petition, which it had not done in its initial response.

In response to the Court's order, Boerckel did not articulate any cause for his procedural defaults. Instead, he argued that the Court should hear his procedurally defaulted claims under the actual innocence or fundamental miscarriage of justice exception to the cause and prejudice standard. Boerckel claimed to have uncovered facts not available at the time of his original trial which cast doubt on Boerckel's conviction. Generally, Boerckel's "new" evidence was that Gary Martin, an individual who had been a suspect initially, may have been involved in the crime. In support of his claim,

Boerckel submitted an affidavit from an investigator and summaries of witness interviews conducted by the investigator.

The Court concluded that a hearing would be necessary in order to resolve Boerckel's claim of actual innocence. A hearing would allow the Court to receive testimony from the individuals Boerckel's investigator had interviewed and to assess the credibility and probative value of their testimony. The state objected to such a hearing in a motion for reconsideration filed shortly before the hearing date. The Court denied the motion for reconsideration, largely because it had been filed so close in time to the hearing date. The Court noted, however, that it might revisit some of the issues raised in the State's motion.

In this Order, the Court will rule on the remaining issues raised by Boerckel's petition. The Court will thoroughly evaluate the State's arguments in opposition to a hearing and the Court will reexamine its conclusion that the actual innocence exception to the cause and prejudice standard applies to this case. The Court concludes that it does. The Court will then address novel issues generated by the recent amendments to 28 U.S.C. § 2254. The Court will then evaluate Boerckel's claim of actual innocence. Finally, the Court will address Boerckel's single claim that is not procedurally defaulted.

II. THE STATE'S OBJECTIONS TO THE HEARING

The Court initially denied the State's motion for reconsideration of the Court's order setting the cause

for a hearing. The Court now revisits the issues raised in the motion. The Court concludes that while a hearing was permissible under prior law, the recent amendments to 28 U.S.C. § 2254 prohibit evidentiary hearings in cases such as this.

A. *Miscarriage of Justice Exception*

Admitting that no cause exists for his procedural defaults, Boerckel invokes what is known as the "actual innocence or miscarriage of justice" exception to the cause and prejudice rule. Actual innocence means two things in habeas corpus jurisprudence. First, it refers to a substantive claim (which is probably limited to capital cases) that the petitioner is entitled to relief solely because he is innocent. *See Herrera v. Collins*, 506 U.S. 390 (1993). Second, it refers to a claim that acts as a gateway through which a petitioner may obtain review of procedurally defaulted claims. The Supreme Court described this second type of actual innocence claim thus:

In a series of cases culminating with *Sawyer v. Whitley*, 505 U.S. 333 (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. But this body of our habeas jurisprudence is not itself a constitutional claim, but

instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

Herrera, 506 U.S. at 404 (citation omitted).

In *Schlup v. Delo*, 115 S. Ct. 851 (1995), the Supreme Court refined the concept of the gateway claim of actual innocence. In particular, the Court set the standard for evaluating such claims. *Schlup* involved a successive habeas petition filed by a man convicted of murder and sentenced to die. The petitioner asserted ineffective assistance of counsel at trial and failure by the prosecution to turn over exculpatory evidence, claims he had not asserted in his first federal habeas petition. The petitioner could not establish cause and prejudice for his default, so the Court concluded that he could only bring his claims if he could establish his claim of actual innocence.¹ The Court had two options from which to

¹ The Court explained the rationale for the actual innocence gateway. Habeas corpus exists as a remedy for violations of a prisoner's constitutional rights at trial, not as a vehicle for reexamining the question of factual guilt. *Herrera*, 506 U.S. at 400. Therefore, when a person who has received an error free trial claims innocence, habeas courts will seldom, if ever, grant the writ. But a claim of innocence accompanied by a claim of constitutional error at trial requires greater scrutiny. See *Schlup*, 115 S. Ct. at 861. The Supreme Court noted that *Schlup*'s conviction might be entitled to less respect than *Herrera*'s because *Schlup* claimed error at trial. But the Court continued:

Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a peti-

(continued...)

choose a standard for evaluating gateway claims of actual innocence: the standard established in *Sawyer v. Whitley*, 505 U.S. 333 (1992),² for claims that a petitioner was actually innocent of the death penalty or the standard suggested in *Murray v. Carrier*, 477 U.S. 478 (1986),³ and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).⁴

¹ (...continued)

tioner such as *Schlup* presents evidence of innocence so strong that a court cannot have confidence in the outcome of trial unless it is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Id.

² *Sawyer* established when a habeas petitioner who brings a "successive, abusive, or defaulted federal habeas claim has shown he is 'actually innocent' of the death penalty to which he has been sentenced so that the court may reach the merits of his claim." 505 U.S. 333, 335 (1992). The Court held that to use actual innocence of the death penalty as a way around a procedural defense, a petitioner must show "by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under [state] law." *Id.* at 350.

³ In *Murray v. Carrier*, the Court considered whether a petitioner whose competent attorney had inadvertently failed to raise an issue on appeal had stated cause for his procedural default. The Court noted that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause and prejudice for the procedural default." 477 U.S. at 496.

⁴ In *Kuhlmann v. Wilson*, the Court set out to "define the considerations that should govern federal courts' disposition of successive petitions for habeas corpus." The Court sought to define when, in the "interests of justice" federal courts should

(continued...)

The Court held that the standard articulated in *Carrier*—that the constitutional violation probably resulted in the conviction of an actually innocent person—applied “when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.” 115 S. Ct. at 867. Because the Court had been vague in *Carrier*, it further defined a petitioner’s burden in *Schlup*. The Court concluded that a petitioner must “show that it is more likely than not that no reasonable juror would have

⁴ (...continued)

entertain successive petitions. The Court concluded that “the ‘ends of justice’ require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.” *Id.* at 454.

The Court focused on defining “the interests of justice” because that language had appeared in an early version of the habeas statute. 477 U.S. 436. The statute, 28 U.S.C. § 2244, required federal courts to satisfy themselves that “the ends of justice will not be served by” entertaining successive petitions. *Id.* (quoting 28 U.S.C. § 2244 (1964)). In 1966, Congress rewrote the habeas statute, this time omitting reference to the ends of justice.

This change presented the Court with the question of whether federal courts still had to make an ends of justice inquiry. The Court concluded that they did. 477 U.S. at 451 (It is clear that Congress intended for district courts, as a general rule, to give preclusive effect to a judgement denying on the merits a habeas petition alleging grounds identical in substance to those raised in the subsequent petition. But the permissive language of § 2244(b) gives federal courts discretion to entertain successive petitions under some circumstances.) The Court then set about the task of determining what those circumstances were, an undertaking started, but not finished, in *Sanders v. United States*, 373 U.S. 1 (1963).

convicted him in light of the new evidence.” *Schlup*, 115 S. Ct. at 867. In other words, a petitioner must “persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 868. In making its decision, a court must presume “that a reasonable juror would consider fairly all of the evidence presented [and] . . . that such a juror would conscientiously obey the instruction of the trial court requiring proof beyond a reasonable doubt.” *Id.*

Boerckel makes a gateway claim of actual innocence. Doing so raises three important questions: 1) is such a claim available to Boerckel, who was not sentenced to death, 2) is the concept available in a case where the claim of innocence is in no way linked to the alleged constitutional violations, and 3) if the exception applies, has Boerckel met his burden of showing actual innocence?

In its motion for reconsideration of the Court’s order setting the case for a hearing, the State argued that the actual innocence exception applies in capital cases. The Court initially ruled that this argument was waived by the state’s failure to raise it in response to Boerckel’s supplemental pleading on the issue of procedural default. After further consideration, the Court concludes that the state’s first argument is also incorrect.

The State’s position has some support in the text of *Schlup*. After all, the Supreme Court stated its holding with explicit reference to “a petitioner who has been sentenced to death” 115 S. Ct. at 867. But the cases from which the Court derived its standard did not involve the death penalty. See *Kuhlmann*, 477 U.S. at

441 (prisoner had been sentenced to 20 years to life and a concurrent term of 7 years); *Carrier*, 477 U.S. 482 (prisoner had been convicted of rape and abduction). Furthermore, the State's rationale is, in large part, that just because the Supreme Court has not applied the actual innocence exception to a noncapital case since deciding *Schlup* (in 1995), that the rule must not apply to a noncapital case. That logic is unconvincing, given the history of the actual innocence exception and the small number of cases the Supreme Court hears in a year. Finally, the State relies on an Eighth Circuit case that does not genuinely support its position. The state cites *Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996). The Eighth Circuit said: "Assuming for purposes of analysis that the fundamental miscarriage of justice exception applies to non-capital cases, Frizzell made no claim of factual innocence." *Id.* That statement is hardly an overwhelming endorsement of the state's position, especially since the Eighth Circuit has applied the standard to noncapital cases. *Whitmore v. Avery*, 63 F.3d 688, 689 (8th Cir. 1996) (arising out of a drug conviction, applying *Schlup* on remand from the Supreme Court "for further consideration in light of [*Schlup*]" (quoting *Whitmore v. Avery*, 115 S. Ct. 1086 (1995))).

The State's second objection to using the actual innocence exception is that Boerckel's claim of actual innocence is not linked to the constitutional violations he alleges in his petition. The State asserts that the actual innocence exception is only available in cases where the petitioner claims that a constitutional violation kept the jury from hearing evidence that would have established his innocence. The Court disagrees.

Although the *Schlup* case involved claims of factual innocence that were somewhat linked to alleged constitutional violations, the Supreme Court's discussion did not unequivocally announce that a linkage must exist. See 2 James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 1995 Supp. at 107, n. 8.06 (citing various passages in the *Schlup* opinion that indicate a delinking of the claim of innocence and the alleged constitutional violation). In particular, the Court in *Schlup* directed lower courts to review all alleged evidence of innocence when ruling on such claim, including inadmissible evidence. Such a directive is inconsistent with the notion that courts should only hear claims of actual innocence that are supported by evidence wrongly excluded from the trial. 115 S. Ct. at 867-68. See also *Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996) (remarking that the Supreme Court in *Schlup* held that "factual innocence is [a] 'gateway' to consideration of independent constitutional violation otherwise barred by procedural default.").

The state makes another argument that is ancillary to its suggestion that the alleged constitutional violations and the evidence of innocence must be linked. The state argues that Boerckel's evidence is not "newly discovered evidence" within the meaning attached to that phrase in habeas corpus jurisprudence because it is not evidence that bears upon a constitutional violation. This assertion comes from a misunderstanding of *Herrera*. Citing *Herrera*, the State asserts that "As a general rule, newly discovered evidence that relates only to petitioner's guilt or innocence is not reviewable by a federal court on a motion for habeas corpus relief." Motion for Reconsideration at 8. In *Herrera*, the Su-

preme Court rejected a claim that evidence of actual innocence was itself evidence of a constitutional violation—the Supreme Court was talking about the first type of actual innocence, not the second, gateway type of actual innocence claim. 506 U.S. at 400 (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”). The Supreme Court’s purpose was to reject, as a general proposition, the claim that a habeas court is a forum to relitigate factual guilt, the Court did not, in doing so, eliminate the notion that evidence of innocence may motivate a court to review alleged constitutional violations. In fact, the Court noted that the miscarriage of justice or actual innocence exception to the cause and prejudice requirement was alive and well, despite the Court’s very narrow view of habeas petitions founded solely on claims of factual innocence. 506 U.S. at 404-05.

B. 28 U.S.C. § 2254(e)(2)

So, it appears that the actual innocence exception described in *Schlup* applies in this case. But that is not the end of the matter. Boerckel supported his claim of actual innocence with numerous reports by an investigator. In order to afford Boerckel an opportunity to present the evidence in support of his claim of actual innocence, the Court conducted a hearing. But, as the State pointed out in its motion for reconsideration, a new provision of § 2254 limits a court’s freedom to conduct evidentiary hearings. Does that new provision

require the Court to disregard the hearing transcript? The state argued that it does. The State’s position raises two questions: First, does the new provision apply to this case, and second, if it does apply how does it apply?

The United States Court of Appeals for the Seventh Circuit has recently held that many of the new provisions of § 2254 may be applied to cases pending before the new provisions became effective. *Lindh v. Murphy*, No. 95-3608, 1996 WL 517290 (7th Cir. Sept. 12, 1996) (en banc). The newly adopted § 2254(e)(2) provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Court agrees with the conclusion recently reached by Judge Shadur of the Northern District of Illinois in

an unpublished opinion. In *United States ex rel. Centanni v. Washington*, Nos. 95 C 7393 & 95 C 7394, 1996 WL 556978 (N.D. Ill. Sept. 9, 1996), Judge Shadur ruled that 2254(e)(2) applies to cases pending when it was adopted. That conclusion is not derived directly from, but is clearly required by *Lindh*. Because the Seventh Circuit performed an exhaustive analysis of the retroactivity issue presented by the new amendments to the habeas corpus law, this court will not. It is clear that procedural provisions such as § 2254(e) may be applied to cases pending when the President signed the Antiterrorism and Effective Death Penalty Act of 1996.

How does § 2254(e)(2) apply to this case? The provision prohibits evidentiary hearings if the petitioner has "failed to develop the factual basis of a claim in State court proceedings" This proceeding is the first time that Boerckel has attempted to show his actual innocence as a way to obtain review of his defaulted claims. Therefore, 2254(e)(2) applies to Boerckel. Boerckel must meet the criteria set forth in § 2254(e)(2)(A) and (B) to receive an evidentiary hearing. Section 2254(e)(2)(A)(i) does not apply because Boerckel's claim does not rest on a new rule of constitutional law made to apply retroactively to habeas cases by the Supreme Court.

To fit within (e)(2)(A)(ii) Boerckel's claim must have "a factual predicate that could not have been previously discovered through the exercise of due diligence." It does not. Boerckel's claim of actual innocence rests on the statements of a number of people that might lead to the conclusion that one Gary Martin and one or two others committed the crime for which Boerckel was convicted. The theory that Gary Martin committed the

crime was known to Boerckel and to his defense counsel in the original trial. In fact, defense counsel questioned witnesses about Gary Martin, who lived in a house behind the victim's. Additionally, discovery provided by the state indicated that Martin had been a police suspect early in the investigation of the crimes. Thus, Boerckel should have pursued the evidence underlying his current claim of innocence at some earlier point. Nothing in the evidence Boerckel sought to put before the Court shows that it was previously unavailable or that it could not have been discovered at some point sooner than 20 years after the original trial.

In addition to showing the prior unavailability of the evidence relied upon, a petitioner seeking an evidentiary hearing must meet the standard in § 2254(e)(2)(B) by showing that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Even if Boerckel did not fail on (e)(2)(A)(ii), he would fail on (e)(2)(B) because his evidence is not clear and convincing proof of innocence.

The Court concludes that under § 2254(e)(2), it should not have held the evidentiary hearing on Boerckel's claim of actual innocence. Therefore, the Court must ignore the evidence presented at the hearing. That leaves only the proffer Boerckel presented with his supplemental pleading to support his claim under *Schlup v. Delo*.⁵

⁵ The Court will not consider other possible repercussions of § 2254(e)(2), such as the possibility that it has somehow elim-

(continued...)

III. BOERCKEL'S CLAIM OF ACTUAL INNOCENCE

Boerckel presents no hard evidence indicating his innocence. Instead, he relies on hearsay. Even if that hearsay is admissible, it is not compelling. Furthermore, the evidence at best shows that Boerckel did not act alone.

Taken in the light most favorable to Boerckel, the evidence is that Gary Martin was involved in the rape of Mrs. Draper. The evidence simply cannot be taken to show that Boerckel was not at all involved in the crime. Assuming jurors believed that Gary Martin was involved in the crime is not inconsistent with their conclusion that Boerckel actually committed the rape. In fact, the proffered evidence shows merely that Gary Martin and at least one other person were responsible for the crime. The evidence insinuates that the other person was not Boerckel, but it is not convincing on this point. Finally, the Gary Martin as alternative suspect theory was dangled before the jury in Boerckel's trial and the jury rejected that theory.

This case is not like *Schlup*, in which the evidence in support of the petitioner's claim of actual innocence included sworn statements by eyewitnesses that the petitioner was not involved in the crime, statements by other witnesses that suggested it would have been physically impossible for the petitioner to have committed

⁵ (...continued)

inated the *Schlup* standard by requiring a showing of actual innocence by clear and convincing evidence before a court may consider a claim the factual basis of which the petition did not develop in state court proceedings.

the crime and then have been seen in the locations where he was. 115 S. Ct. 851. Such testimony, if reliable, would have cast serious doubt on the validity of the petitioner's conviction. Therefore, the Supreme Court suggested that a hearing might be appropriate to evaluate the reliability of the petitioner's evidence. *Id.* Boerckel presents no evidence that suggests he was not there when the crime occurred. The only evidence he would offer is evidence that someone else might have participated. Even if Boerckel's evidence is true and totally credible, it is not exculpatory evidence and therefore does not help Boerckel meet the burden of *Schlup*.

The Court finds that Boerckel has shown no cause for his procedural defaults and no prejudice suffered as a result thereof. Furthermore, failing to hear his defaulted claims would not constitute a miscarriage of justice under *Schlup v. Delo*.

IV. GROUND SIX: ALLEGED BRADY VIOLATION

The preceding conclusion leaves only one claim for the Court to review on the merits. As his sixth ground for relief, Boerckel asserts that he was denied his rights to due process of law by the state's failure to turn over certain exculpatory material. Specifically, Boerckel states that "Defense counsel made a discovery motion that included a request for information regarding any other suspects in the investigation. The court denied the motion and the State did not turn over any information on the other suspects in the case." Amended Petition at 7.

This claim, made under *Brady v. Maryland*, 373 U.S. 83 (1963), is one of the claims Boerckel presented to the Illinois Appellate Court. *People v. Boerckel*, 24 Ill. Dec. 674, 681 (Ill. App. Ct. 5th Dist. 1979). The Illinois Appellate Court rejected the claim:

The defendant has not directed our attention to any item that was not disclosed as a result of the trial court's ruling that would have tended to negate his guilt. The State indicated in its response to defendant's discovery motion that it was not in possession of any such material. We have no reason to doubt the veracity of that representation. Surely the fact that some other young men in the Litchfield area may have been considered suspects during the preliminary stages of investigation does not indicate that any material developed with respect to them would tend to negate defendant's guilt of these crimes. The trial court did not err in denying discovery as to these materials. "The State is not required to produce a defendant's witnesses or to create his defenses." (*People v. Lightning*, 83 Ill.App.2d 430, 435, 228 N.E. 2d 104, 105.) Moreover, most, if not all, of the information sought by defendant was supplied to him in the form of the investigation report of Litchfield police officer Richard Elledge.

24 Ill. Dec. at 681.

The Court need not question the Illinois Appellate Court's ruling that the material sought was not exculpatory because the court also ruled that the request for discovery was moot because all the information available had been provided to Boerckel.

Pursuant to 28 U.S.C. § 2254(d), this Court may only grant relief on this ground if the Illinois Appellate Court's resolution of the issue:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d). See *Lindh v. Murphy*, 1996 WL 517290 (applying § 2254(d) to cases pending when the new provision was adopted). The Illinois Appellate Court's ruling on the discovery issue was not unreasonable, it was a sound resolution of an apparently meritless claim. Furthermore, the decision was not contrary to, or an unreasonable application of, clearly established federal law. "For a defendant to succeed on a *Brady* claim, he must show, '(1) that the prosecutor suppressed evidence; (2) that such evidence was favorable to the defense; and (3) that the suppressed evidence was material.'" *United States v. Flores-Sandoval*, 94 F.3d 346, 353 (7th Cir. 1996) (quoting *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992)). Boerckel's *Brady* claim fails because he has not shown that the prosecutor suppressed any evidence. For that reason, the Illinois Appellate Court's decision was in compliance with, not contrary, to established federal law.

JA 22

V. CONCLUSION

The Court concludes that Boerckel's first, second, third, and fifth grounds for habeas corpus relief are procedurally defaulted. No cause exists for the default and failure to adjudicate the claims would not constitute a miscarriage of justice. The Court also finds that Boerckel's sixth ground for relief is without merit.

Ergo, Boerckel's Amended Petition for Writ of Habeas Corpus (d/e 44) is DENIED.

ENTER: 28 Oct., 1996.

FOR THE COURT:

RICHARD MILLS
United States District Judge

JA 23

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4068

DARREN E. BOERCKEL,

Petitioner-Appellant,

v.

WILLIAM D. O'SULLIVAN,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 94 C 3258—Richard Mills, Judge.

ARGUED OCTOBER 20, 1997—DECIDED FEBRUARY 9, 1998

Before BAUER, FLAUM, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. This is a case about comity. Boerckel raises claims in his petition for habeas corpus that he raised in his direct appeal to the Appellate Court of Illinois but that he did not include in his petition for leave to appeal to the Illinois Supreme Court. The district court dismissed these claims as procedurally barred. Between the district court's order and oral argument, this Court revised its approach to this issue in *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996), and *Gomez v. Acevedo*, 106 F.3d 192 (7th Cir.), *vacated on other grounds*, ___ U.S. ___, 118 S. Ct. 37 (1997). After considering this subsequent change in our view, we reverse and remand.

I. HISTORY

In 1976, law enforcement authorities in Montgomery County, Illinois questioned several young men about an incident of rape, burglary, and aggravated battery involving an 87-year-old woman. One of those young men was the petitioner, Darren Boerckel. At the time, Boerckel was a 17-year-old boy with an IQ of approximately 70 and a long-standing reading defect. *See People v. Boerckel*, 385 N.E.2d 815, 821, 824 (Ill. App. Ct. 1979).

After Boerckel received his *Miranda* warnings, the police questioned him for two hours. Promising to take him to see his girlfriend when they were finished, the police obtained a signed confession. One of the officers wrote the confession using the same or similar words to those of Boerckel because Boerckel indicated that he did not write very well. *See id.* at 819. Boerckel was subsequently charged with rape, burglary, and aggravated battery. *See id.* at 817.

Before trial, Boerckel's attorney unsuccessfully attempted to suppress the confession. At trial, prosecutors presented the confession and the fact that Boerckel has the same blood type as the rapist as evidence. A jury convicted Boerckel on all three charges. *See id.* at 818.

Boerckel appealed his conviction to the Appellate Court of Illinois. He argued that the trial court erred in denying his motion to suppress because the confession was fruit of an illegal arrest, he did not receive his *Miranda* warnings properly, and he confessed involuntarily. Boerckel also claimed that the court erred in admitting certain evidence, denying his motion for discovery, denying his motion for a directed verdict since there was insufficient evidence to sustain a conviction, and denying his motion for mistrial because of prosecutorial misconduct. That court affirmed the conviction in a split decision. *See id.* at 824.

Boerckel then filed a petition for leave to appeal to the Illinois Supreme Court, raising only three issues. He questioned whether he was under arrest before he gave incriminating statements, whether prosecutorial misconduct

denied him a fair trial, and whether he was improperly denied discovery. The petition was denied. The United States Supreme Court also denied his petition for *certiorari*. *See Boerckel v. Illinois*, 447 U.S. 911 (1980).

On September 26, 1994, Boerckel filed a *pro se* petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of Illinois. The court appointed counsel on January 31, 1995, and an amended petition was filed on March 15, 1995. The amended petition raised the following issues: 1) whether Boerckel knowingly and intelligently waived his *Miranda* rights; 2) whether his confession was involuntary; 3) whether the evidence against him was insufficient to support a guilty verdict; 4) whether his confession was the fruit of an illegal arrest; 5) whether he received ineffective assistance of both trial and appellate counsel; and 6) whether the prosecution violated his right of discovery under *Brady v. Maryland*, 373 U.S. 83 (1963).

The district court entered an order on November 15, 1995 dismissing the fourth ground of the petition on the merits as barred by *Stone v. Powell*, 428 U.S. 465 (1976). The court also held that Boerckel procedurally defaulted on the fifth ground since it was never raised on direct appeal to any state court but that the sixth ground was properly presented and should be addressed on the merits. Finally, the court determined that Boerckel had procedurally defaulted on the first, second, and third grounds under *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985), because these grounds were not included in the petition for leave to appeal to the Illinois Supreme Court. These grounds were procedurally barred because the time period in which Boerckel could have raised them to the Illinois Supreme Court had passed.

After these initial rulings, the court requested additional briefing. Specifically, the district court asked Boerckel to address the issue of cause for or prejudice from his procedural defaults on the first, second, third, and fifth grounds. The court also directed the State to respond to the merits of Boerckel's petition, which it had not done in its initial re-

sponse. Boerckel did not articulate any cause for his procedural defaults. Instead, he argued that the court may hear his claims under the actual innocence or fundamental miscarriage of justice exception to the rule of procedural default.

On July 24, 1996, the court set the matter for hearing. At the hearing, Boerckel presented witnesses who testified that, in the years since his conviction, two men have made statements that they committed the rape for which Boerckel was convicted.

On October 28, 1996, the district court found that the recent amendments to 28 U.S.C. § 2254 prohibited an evidentiary hearing¹ and that the court must ignore the evidence presented at the trial. The court added, however, that even if it believed the witnesses, it would only establish that others were present, not that Boerckel was not present. The district court further found that Boerckel had procedurally defaulted on his first, second, third, and fifth grounds for habeas corpus relief and that he failed to show cause for the default.

Boerckel appealed to this Court.

II. ANALYSIS

The sole issue in this appeal is whether, by failing to raise claims in his petition for leave to appeal to the Illinois Supreme Court, Boerckel procedurally defaulted on his claims that 1) he did not knowingly and intelligently waive his *Miranda* rights, 2) his confession was involuntary, and

¹ When the district court made this determination, it relied on this Court's interpretation of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (holding that courts may apply the statute retroactively). The Supreme Court has subsequently reversed our interpretation of this issue. See *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059 (1997). On remand, the district court should apply § 2254 as it existed before these amendments.

3) the evidence against him was insufficient to support a guilty verdict.

A.

Before a federal court may address the merits of a § 2254 habeas petition, a petitioner must provide the state courts with a full and fair opportunity to review his claims. See *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Farrell v. Lane*, 939 F.2d 409, 410 (7th Cir. 1991). In particular, a petitioner must exhaust his state remedies, see 28 U.S.C. § 2254(b), (c), and avoid procedurally defaulting his claims during the state court proceedings, see *United States ex rel. Simmons v. Gramley*, 915 F.2d 1128, 1132 (7th Cir. 1990). The doctrines of exhaustion and procedural default both "involve situations in which a failure to present a claim in the state courts bars the granting of federal habeas corpus relief in the federal courts." See James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 23.1 n.9 (1988 & supp. 1993). The doctrines, however, are distinct and have different ramifications.

1.

The exhaustion doctrine is an ordering device. In *Ex Parte Royall*, 117 U.S. 241 (1886), the Supreme Court held that federal courts should not, for reasons of comity and deference to state courts, entertain a claim in a habeas corpus petition until after the state courts have had an opportunity to hear the matter. See *id.* at 252-53. Subsequently incorporated into the habeas statute, the doctrine states that individuals in state government custody may bring a habeas corpus petition only if they have exhausted the remedies available in state court or "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights" of that individual. 28 U.S.C. § 2254(b). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he

has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

Read narrowly, this language appears to prevent federal courts from concluding that a petitioner has exhausted his remedies if there exists any possibility of further state court review. The Supreme Court has expressly rejected this interpretation. See *Brown v. Allen*, 344 U.S. 443, 447, 448-49 n.3 (1953) (holding that the exhaustion doctrine does not require habeas petitioners to seek state collateral relief based upon the same evidence and issues once the state courts have already ruled on the claim on direct review). Instead, federal court review is delayed until the state has had a chance to correct any errors in its law or procedures. See, e.g., *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (*per curiam*) (stressing that exhaustion requirement allows state courts an "initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights") (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)).

Thus, the exhaustion doctrine allows the state court system to decide the merits of the claim first. An exhaustion question is only one of timing, not jurisdiction. It determines not whether but when a federal court will consider a habeas corpus petition. See *Fay*, 372 U.S. at 418 ("This qualification plainly stemmed from considerations of comity rather than power, and envisaged only the postponement, not the relinquishment, of federal habeas corpus jurisdiction."); see also Matthew L. Anderson, Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 Minn. L. Rev. 1197, 1201-02 (1995).

2.

The failure to use available state procedures, however, likely will prevent federal habeas corpus relief, not because of exhaustion problems, but rather because the petitioner will have forfeited his claim by violating a state procedural rule. See Liebman & Hertz, *supra*, § 23.1 n.9.

The doctrine of procedural default bars federal habeas review when a state court declines to address a prisoner's federal claims because the defendant has not met a state procedural requirement. See *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); see also *Ulster County Court v. Allen*, 442 U.S. 140, 148 (1979); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a default occurs, federal relief is foreclosed because the default constitutes an independent and adequate state ground on which the decision rests. See Liebman & Hertz, *supra*, § 23.1 n.9.

On both direct review and habeas review, the Supreme Court has held that it will not consider an issue of federal law from a judgment of a state court if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. See *Harris v. Reed*, 489 U.S. 255, 260 (1989); see also *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-36 (1875). Without the independent and adequate state ground doctrine, habeas petitioners would be able to avoid the exhaustion requirement by failing to satisfy a state's procedural rules, rendering the defaulted state remedies unavailable. See *Coleman*, 501 U.S. at 732. Thus, "[t]he independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases," *id.*, by requiring petitioners to satisfy a state's procedural rules and exhaust their state remedies or face the penalty of having their claims barred from federal habeas review.

B.

When the district court heard Boerckel's petition, this Court believed that a federal habeas petitioner forfeited the right to habeas relief if he did not seek review in a state's highest court of all the claims presented in his habeas petition. See *Nutall v. Greer*, 764 F.2d 462, 463-64 (7th Cir. 1985); see also *Lostutter v. Peters*, 50 F.3d 392 (7th Cir.

1995); *Jones v. Washington*, 15 F.3d 671, 675 (7th Cir. 1994); *Mason v. Gramley*, 9 F.3d 1345 (7th Cir. 1993). Then, in 1996, this Court revised its approach to the doctrine of procedural default.

1.

In *Hogan v. McBride*, this Court reconsidered whether a federal habeas petitioner forfeits a claim that is not included in a discretionary petition for transfer to the state's highest court. See 74 F.3d at 144. In *Hogan*, the petitioner did not include a confrontation claim in his discretionary appeal to Indiana's highest court, and the district court deemed this claim forfeited as a procedural default under *Wainwright*, 433 U.S. at 72. See *Hogan*, 74 F.3d at 145.

The Court evaluated whether Indiana law encourages petitioners to be selective in the presentation of their claims to the Indiana Supreme Court, recognizing that "[f]orfeiture under § 2254 is a question of a state's internal law: failure to present a claim at the time, and in the way, required by the state is an independent state ground of decision, barring review in federal court." *Hogan*, 74 F.3d at 146 (citing *Coleman*, 501 U.S. at 729-44; *Harris*, 489 U.S. at 244). After reviewing Indiana's appellate rules, it concluded that Indiana "discourages litigants from raising every possible claim of error, which implies that omission is not to be penalized." *Hogan*, 74 F.3d at 146. Thus, the Court concluded that "[t]he claim was not forfeited; it was resolved on the merits; and when the last state court to address a question reaches the merits without invoking a rule of forfeiture, the question is open on collateral review under § 2254." *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Coleman*, 501 U.S. at 732-35).

The Court also explained why *Nutall* and its progeny were erroneous. "*Nutall* was decided before the Supreme Court refined the forfeiture doctrine in *Harris*, *Coleman*, and *Ylst*. These opinions establish that § 2254 asks whether an independent and adequate state ground supports the

decision. Forfeiture depends on state law" *Hogan*, 74 F.3d at 147. Thus, "[i]f the prisoner has presented his argument to the right courts at the right times—as the states define these courts and times—then the claim is preserved for federal collateral review." *Id.*

2.

In *Gomez v. Acevedo*, the Court applied its *Hogan* analysis to determine whether Gomez defaulted on a claim by not including it in his petition to the Illinois Supreme Court. See 106 F.3d at 196. After reviewing Illinois case law, the Court determined that a petition for leave to appeal "is not necessarily an adversary proceeding to which the application of . . . the doctrine of waiver . . . is appropriate." *Id.* (quoting *People v. Edgeworth*, 332 N.E.2d 716, 720 (Ill. App. Ct. 1975)). Also, the Court noted that a denial of leave to appeal "carr[ies] no connotation of approval or disapproval of the appellate court action." *Gomez*, 106 F.3d at 196 (quoting *People v. Vance*, 390 N.E.2d 867, 872 (Ill. 1979)). Thus, it concluded that Gomez did not procedurally default by failing to present a claim to the Illinois Supreme Court. See 106 F.3d at 196.

C.

O'Sullivan argues that this Court's analysis in *Hogan* and holding in *Gomez* are erroneous and that we should return to our previous view of procedural default and dismiss Boerckel's claims as defaulted. He claims that an exception exists to the general rule that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Coleman*, 501 U.S. at 735-36 (quoting *Harris*, 489 U.S. at 263). Specifically, O'Sullivan highlights a footnote in *Coleman* which states that this clear statement rule "does not apply if the petitioner failed to exhaust state remedies and the court to

which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." 501 U.S. at 735 n.1. In such a scenario, the Supreme Court reasoned that a procedural default exists "for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.*

O'Sullivan believes that the exception to the rule announced in *Coleman* is precisely the situation in this case. Boerckel did not raise three claims to the Supreme Court of Illinois that he raises in his habeas petition, and the time for filing a petition to that court has long passed. See Ill. S. Ct. R. 315(b). Thus, he contends that Boerckel procedurally defaulted by not presenting these claims to the Illinois Supreme Court.

1.

In *Hogan* and *Gomez*, this Court evaluated the state law of forfeiture to determine whether Indiana and Illinois penalized litigants for not including claims in petitions to the Indiana and Illinois Supreme Court. See 74 F.3d at 146; 106 F.3d at 196. By raising the question of whether Boerckel has exhausted his state remedies as a preliminary inquiry in determining whether Boerckel has procedurally defaulted, O'Sullivan has shifted the focus of our analysis. The critical issue in responding to O'Sullivan's argument is not whether the state court relied on a procedural rule to conclude that the petitioner procedurally defaulted on the claim. Rather, it is whether the petitioner's refusal to include all his claims in his petition for leave to appeal to the Illinois Supreme Court constitutes a failure to exhaust his state court remedies, which thereby bars him from raising them in his habeas petition under the doctrine of procedural default.

As we noted earlier, a petitioner exhausts his remedies when he provides the state courts with a full and fair opportunity to review his claims. See *Keeny v. Tamayo-Reves*,

504 U.S. 1, 10 (1992); *Picard*, 404 U.S. at 276. Even though O'Sullivan's argument alters our analysis, the result remains the same. We hold that the exhaustion requirement of § 2254 does not require a petitioner to include all of his claims in a petition for leave to appeal to the Illinois Supreme Court to exhaust his state remedies.²

2.

The key to solving the puzzle of how many chances a petitioner must give the state courts to review his claims lies in the language of § 2254. Section (c) provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has *the right under the law of the State to raise*, by any available procedure, *the question presented*." 28 U.S.C. § 2254(c) (emphasis added). Codified in 1948, this section incorporated the common law on exhaustion. See *Rose*, 455 U.S. at 515; see also *Ex parte Hawke*, 321 U.S. 114, 116-17 (1944). The question, however, has always remained: "*To what extent must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court?*"

² Although we refuse O'Sullivan's invitation to stray from our established position, we note that other circuits are split on this issue. Compare *Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) (*per curiam*) (Petitioner must seek discretionary review in Arizona state courts; "the right to raise" an issue does not entail a right to have that issue considered on its merits.); *Grey v. Hoke*, 933 F.2d 117, 119 (2d Cir. 1991) (Petitioner must present claim to highest court of the state before a federal court may consider its merits.); and *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985) (Petitioner must seek discretionary review in the Texas Court of Criminal Appeals.) with *Dolny v. Erickson*, 32 F.3d 381 (8th Cir. 1994) (Petitioner need not request discretionary review in Minnesota Supreme Court.); and *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (For purposes of § 2254, Georgia defendant who lost appeal as a matter of right, need not petition the Georgia Supreme Court for *certiorari*, given that court's limited jurisdiction.).

Castille v. Peoples, 489 U.S. 346, 349-50 (1989) (Scalia, J., for unanimous Court) (quoting *Wainwright*, 433 U.S. at 78) (emphasis added in *Castille*). We interpret the right to raise the question presented to mean more than simply the ability to present a question to a court and request an opportunity to be heard. See *Dolny*, 32 F.3d at 384 (stressing that "[t]he right . . . to raise" an issue referred to in § 2254 means more than a mere opportunity to seek leave to present an issue; it means a realistic, practical chance to present an issue and have it considered on the merits"); Liebman & Hertz, *supra*, § 23.4. We believe an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right.

3.

In Illinois, the right of a petitioner to have his claim considered by the Illinois Supreme Court is restricted. It is within the sound judicial discretion of the Illinois Supreme Court to decide whether to review the bulk of the decisions of the Appellate Court of Illinois. See Ill. S. Ct. R. 315(a); see also *Bowman v. Illinois Cent. Ry. Co.*, 142 N.E.2d 104 (Ill. 1957). In determining whether to grant a petition for leave to appeal, the court evaluates criteria which include "the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." Ill. S. Ct. R. 315(a); cf. *Hogan*, 74 F.3d at 146 (determining that Indiana's appellate rules are similarly constructed); *Dolny*, 32 F.3d at 384 (similar in Minnesota); *Buck*, 743 F.2d at 1569 (similar in Florida). The fact that Illinois discourages litigants from raising every possible claim of error is evidence that Illinois does not consider it necessary that petitioners raise all of their claims to exhaust their remedies.

Moreover, Illinois recognizes that its Supreme Court's practice is similar to the *certiorari* procedure in the United States Supreme Court. See Ill. S. Ct. R. 315 Comm. Cmts. The denial of a leave to appeal is not a decision on the merits of a case just like the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (plurality) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)); see also *People v. Vance*, 390 N.E.2d 867, 872 (Ill. 1979). In *Fay v. Noia*, the Supreme Court recognized that a petitioner's failure to timely seek *certiorari* in the Supreme Court does not bar a state prisoner from federal habeas relief. See 372 U.S. 391, 435 (1963), *overruled on other grounds by Coleman*, 501 U.S. at 748-51. To remain consistent with *certiorari* practice, Boerckel's decision not to include all of his claims does not bar him from federal habeas relief.

4.

Also, we can infer that a petitioner provides state courts with a fair presentation of his claim in his appeal as of right, not in a petition for leave to appeal. See *Wilwording*, 404 U.S. at 250.

In *Castille*, the Supreme Court held that a prisoner who raised an issue for the first time on a petition to the Pennsylvania Supreme Court for allocatur did not provide the state courts with "fair presentation" of the claim for purposes of the exhaustion requirement. See 489 U.S. at 351. Under Pennsylvania law, allocatur review is not a matter of right, but of sound judicial discretion, and an appeal is allowed only when there are special and important reasons. See Pa. R. App. Proc. 1114. The court concluded that raising a claim in a procedural context in which discretion exists to refuse to consider the merits does not constitute "fair presentation." See *Castille*, 489 U.S. at 351; see also *Cruz*, 907 F.2d at 669 (holding that a petitioner did not exhaust his state remedies by merely submitting a claim to the Illinois Supreme Court).

Then, in *Ylst*, the Supreme Court considered whether a state prisoner procedurally defaulted his habeas claims when an unexplained denial for state habeas corpus followed a rejection of the same claim by the state's appellate court on direct appeal. See 501 U.S. at 799. In concluding that the prisoner procedurally defaulted, the court reasoned that the prisoner "had exhausted his . . . claim by presenting it on direct appeal, and was not required to go to state habeas at all." *Id.* at 805.

Thus, if Boerckel must provide state courts with an opportunity to correct any alleged violation of his federal rights and a petition for leave to appeal does not constitute this opportunity, see *Castille*, 489 U.S. at 351, and Boerckel is not required to seek state habeas proceedings, see *Ylst*, 501 U.S. at 805, then a petitioner provides the state courts with the required opportunity in the petitioner's direct appeal as of right.

5.

Our holding is also consistent with the principles underlying the exhaustion requirement. Comity is the primary basis for the exhaustion requirement. See *Rose v. Lundy*, 455 U.S. 509, 515 (1982); *Hawk*, 321 U.S. at 117.

Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)); see also *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*) (noting that the exhaustion requirement "serves to minimize friction between our federal and

state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. Federal courts do not snatch claims from state courts when they review claims not included in discretionary petitions to state supreme courts. Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.

We also note that requiring petitioners to argue all of their claims to the state supreme court would turn federalism on its head. If a state has chosen a system that asks petitioners to be selective in deciding which claims to raise in a petition for leave to appeal to the state's highest court, we seriously question why this Court should require the petitioner to raise all claims to the state's highest court if he hopes to request habeas review. The exhaustion requirement of § 2254 does not require such a result.

Moreover, contrary to O'Sullivan's suggestion, this decision will not "obliterate any opportunity for a state's highest court to protect federally secured rights because it will leave state prisoners with little incentive to petition state supreme courts." Respondent Br. at 19. It is difficult to imagine that this holding will induce attorneys and defendants in state government custody to withhold an appropriate claim in a petition for leave to appeal to the state's highest court, knowing that it cannot hurt and could only potentially help their cause. O'Sullivan's argument assumes a remarkably risk-prone group of defendants and attorneys, especially given the fact that "the success rate at trial and on appeal, while low, is greater than the success rate on habeas corpus." See Judith Resnik, *Tiers*, 57 S. Cal. L. Rev. 837, 894 (1984). We do not believe that it accurately pre-

dicts the effect our holding will have on the incentives to petition the Illinois Supreme Court.

Finally, we reiterate our concern that "[t]reating an omission from a petition for a discretionary hearing as a conclusive bar to federal review under § 2254 could create a trap for unrepresented prisoners, whose efforts to identify unsettled and important issues suitable for discretionary review would preclude review of errors under law already established." *Hogan*, 74 F.3d at 147.

We therefore hold that Boerckel exhausted his state remedies by including these claims in his direct appeal to the Appellate Court of Illinois. The exhaustion principle of § 2254 does not require him to include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. Thus, we do not need to reach the question of whether the Illinois Supreme Court would find these claims procedurally barred because of its timing requirement. For these reasons, we REVERSE the district court's dismissal of Boerckel's habeas petition and REMAND for further proceedings consistent with this decision.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

DARREN E. BOERCKEL, Petitioner-Appellant,
v.
WILLIAM D. O'SULLIVAN, Respondent-Appellee.

No. 96-4068

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1998 U.S. App. LEXIS 6150

March 20, 1998, Decided

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Central District of Illinois, No. 94 C 3258. Richard Mills, Judge.

Original Opinion of February 9, 1998, Reported at: 1998 U.S. App. LEXIS 1768.

COUNSEL: For DARREN E. BOERCKEL, Petitioner - Appellant: David B. Mote, Richard H. Parsons, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Springfield, IL USA.

For WILLIAM D. O'SULLIVAN, Respondent - Appellee: Catherine Glenn, OFFICE OF THE ATTORNEY GENERAL, Criminal Appeals Division, Chicago, IL USA.

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. JOEL M. FLAUM, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge.

OPINION: ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled cause, no judge in active service has requested

JA 40

a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

(2)

No. 97 - 2048

Supreme Court, U.S.
FILED

DEC 30 1998

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

WILLIAM D. O'SULLIVAN,

v.

Petitioner,

DARREN BOERCKEL,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit**

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

May an individual who is in custody pursuant to a state criminal conviction pursue claims in a federal *habeas* petition if those claims were not raised on direct appeal in a petition for discretionary review to the state's highest court?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT:	
THE EVOLUTION OF THE REMEDY OF HABEAS CORPUS, IN GENERAL, AND THE DOCTRINE OF EXHAUSTION, IN PARTI- CULAR, JUSTIFY THE ENFORCEMENT OF A RULE REQUIRING PETITIONERS TO RAISE THEIR CLAIMS TO THE HIGHEST COURT OF THE STATE ON DIRECT AP- PEAL IN ORDER TO PRESERVE THOSE CLAIMS FOR FEDERAL COLLATERAL RE- VIEW	9
A. The Court of Appeals' Holding Conflicts With Principles of Federalism and Com- ity	10
B. The Rule Proposed By O'Sullivan Would Be Consistent With This Court's Recent Precedents In <i>Habeas Corpus</i> Law	25
CONCLUSION	33

TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Boerckel v. Illinois</i> , 447 U.S. 911 (1980)	2, 20
<i>Boerckel v. O'Sullivan</i> , 135 F.3d 1194 (7th Cir. 1998)	1, 5, 16, 19, 21-22, 24, 31
<i>Braden v. 30th Judicial Circuit Court of Kentucky</i> , 410 U.S. 484 (1973)	10
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	3
<i>Brown v. Allen</i> , 344 U.S. 443 (1953)	7-8, 17, 18
<i>Buck v. Green</i> , 743 F.2d 1567 (11th Cir. 1984)	19, 32
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985)	22
<i>Castille v. Peoples</i> , 489 U.S. 346 (1989)	17, 31
<i>Caswell v. Ryan</i> , 953 F.2d 853 (3rd Cir. 1992)	32
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	7, 13, 14-15, 16, 22, 24
<i>Costarelli v. Massachusetts</i> , 421 U.S. 193 (1975) (<i>per curiam</i>)	20-21
<i>Darr v. Burford</i> , 339 U.S. 200 (1950)	6, 11, 26
<i>Dolny v. Erickson</i> , 32 F.3d 381 (8th Cir. 1994)	19, 32

<i>Duckworth v. Serrano</i> , 454 U.S. 1 (1981) (<i>per curiam</i>)	6, 11
<i>Dulin v. Cook</i> , 957 F.2d 758 (10th Cir. 1992)	32
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982)	6, 9, 14, 28-29, 30
<i>Ex parte Hawk</i> , 321 U.S. 114 (1944)	17
<i>Ex parte Royall</i> , 117 U.S. 241 (1886)	6, 10, 11
<i>Fay v. Noia</i> , 372 U.S. 391 (1963)	7, 18-19, 26, 27, 28, 29
<i>Francis v. Henderson</i> , 425 U.S. 536 (1976)	27, 30
<i>Grey v. Hoke</i> , 933 F.2d 117 (2nd Cir. 1991)	32
<i>Harris v. Reed</i> , 489 U.S. 255 (1989)	15, 22, 30
<i>Hogan v. McBride</i> , 74 F.3d 144 (7th Cir.), modified on reh'g denied, 79 F.3d 578 (7th Cir. 1996)	22, 23, 31
<i>Jennison v. Goldsmith</i> , 940 F.2d 1308 (9th Cir. 1991) (<i>per curiam</i>)	24, 32
<i>Keeney v. Tamayo-Reyes</i> , 504 U.S. 1 (1992)	6, 9-10, 18, 29-30
<i>Kuhlmann v. Wilson</i> , 477 U.S. 436 (1986)	29
<i>Lindh v. Murphy</i> , 96 F.3d 856 (7th Cir. 1996)	4

<i>Lindh v. Murphy</i> , 521 U.S. 320 (1997)	4
<i>McNeeley v. Arave</i> , 842 F.2d 230 (9th Cir. 1988)	32
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	22
<i>Nutall v. Greer</i> , 764 F.2d 462 (7th Cir. 1985)	3, 22
<i>People v. Boerckel</i> , 68 Ill.App.3d 103, 385 N.E.2d 815 (5th Dist. 1979)	2
<i>People v. Neal</i> , 142 Ill.2d 140 (1990), <i>cert.</i> denied, <i>Neal v. Illinois</i> , 502 U.S. 943 (1991)	18
<i>Richardson v. Procnier</i> , 762 F.2d 429 (5th Cir. 1985)	32
<i>Roberts v. LaVallee</i> , 389 U.S. 40 (1967)	13
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982)	6, 9, 10-11, 12, 13, 14, 25, 30, 31
<i>Sanders v. United States</i> , 373 U.S. 1 (1963)	27
<i>Silverburg v. Evitts</i> , 993 F.2d 124 (6th Cir. 1993)	32
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	3
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	15, 29, 30

<i>Townsend v. Commissioner</i> , No. 94-1270, 1994 U.S. App. LEXIS 9750 (1st Cir. May, 1994) (unpublished opinion)	32
<i>Townsend v. Sain</i> , 372 U.S. 293 (1963)	27
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	7, 8, 18, 25, 27-28, 29, 30
<i>Wilwording v. Swenson</i> , 404 U.S. 249 (1971)	8, 17, 18
<i>Withrow v. Williams</i> , 507 U.S. 680 (1993)	10
<i>Ylst v. Nunnemaker</i> , 501 U.S. 797 (1991)	17, 22, 23

Statutes and Rules

Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214 (1996)	4, 12, 13
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1257(a)	20
28 U.S.C. § 1291	2
28 U.S.C. § 2101(c)	1
28 U.S.C. § 2253	2
28 U.S.C. § 2254	2, 4, 5, 11, 21, 31

28 U.S.C. § 2254(b)	14
28 U.S.C. § 2254(b)(2)	12
28 U.S.C. § 2254(c)	1, 7, 16-17
28 U.S.C. § 2255	27
705 ILCS 10/12	21
725 ILCS 5/122-1 <i>et seq.</i>	18
Illinois Supreme Court Rule 315	18
Illinois Supreme Court Rule 315(b)	16, 21
Illinois Supreme Court Rule 315, Comm. Cmts. . .	24

Other

Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, Hart and Wechsler's <i>The Federal Courts and the Federal System</i> 1502 (3d ed. 1988 & Supp. 1992)	10
<i>Developments, Federal Habeas Corpus</i> , 83 HAR. L. REV. 1038 (1970)	10
Daniel A. Farber et al., <i>Constitutional Law</i> (1993)	9
Brief For Respondents, <i>Harris v. Reed</i> , No. 87-5677, October Term, 1987	23

James S. Liebman & Randy Hertz, <i>Federal Habeas Corpus Practice and Procedure</i> Vol. 2 § 23.1 (2nd ed.)	10
Note, <i>Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting</i> , 79 MINN. L. REV. 1197 (1995) (authored by Matthew L. Anderson)	19, 20
Don R. Sampen, <i>Defendant fails to preserve federal claim</i> , <i>Chicago Daily Law Bulletin</i> , June 3, 1997	24
Mary Ann Snow, Comments, <i>Lundy Isaac and Frady: A Trilogy of Habeas Corpus Restraint</i> , 32 CATH. U. L. REV. 169 (1982) . .	27
Larry W. Yackle, <i>Explaining Habeas Corpus</i> , 60 N.Y.U.L. REV. 991 (1985)	19

OPINIONS BELOW

The October 28, 1996 unpublished order of the United States District Court for the Central District Of Illinois, Springfield Division, is reprinted in the joint appendix at 4. The February 9, 1998, decision of the United States Court of Appeals for the Seventh Circuit is published at 135 F.3d 1194 (7th Cir. 1998), and is reprinted in the joint appendix at 23. The March 20, 1998 order of the Court of Appeals, denying O'Sullivan's Petition for Rehearing with Suggestions for Rehearing *En Banc*, is published at 1998 U.S. App. LEXIS 6150 (7th Cir. March 20, 1998), and reprinted in the joint appendix at 39.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on February 9, 1998, and rehearing was denied on March 20, 1998. O'Sullivan filed the Petition for Writ of *Certiorari* on June 17, 1998. On November 16, 1998, this Court granted the Petition limited to the question presented. O'Sullivan invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and § 2101(c).

STATUTE INVOLVED

The case puts in issue 28 U.S.C. § 2254(c), which provides:

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

The United States District Court for the Central District of Illinois, Springfield Division, asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit's jurisdiction was founded upon 28 U.S.C. §§ 1291 and 2253.

Boerckel had appealed from a final judgment of the district court denying his petition for writ of *habeas corpus* brought pursuant to 28 U.S.C. § 2254. Boerckel had previously been convicted of rape, burglary, and aggravated battery pursuant to a 1977 state court judgment following a jury trial. Boerckel was sentenced to concurrent terms of imprisonment of 20 to 60, 5 to 15, and 2 to 6 years, respectively. His convictions and sentences were affirmed on direct appeal to the Illinois Appellate Court, Fifth District, on January 10, 1979. See *People v. Boerckel*, 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th Dist. 1979). And on May 31, 1979, the Illinois Supreme Court denied his petition for leave to appeal. Boerckel filed a petition for writ of *certiorari* which was also denied. See *Boerckel v. Illinois*, 447 U.S. 911 (1980).

On September 26, 1994, Boerckel filed a *pro se* petition for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of Illinois. The court subsequently appointed counsel and an amended petition was filed on March 15, 1995. The amended petition raised the following six issues: (1) whether Boerckel knowingly and intelligently waived his *Miranda* rights; (2) whether his confession was involuntary; (3) whether the evidence against him was insufficient to support a guilty verdict; (4) whether

his confession was the fruit of an illegal arrest; (5) whether he received the ineffective assistance of both trial and appellate counsel; and (6) whether the prosecution violated his right of discovery under *Brady v. Maryland*, 373 U.S. 83 (1963).

The district court entered an order on November 15, 1995 dismissing the fourth ground of the petition on the merits as barred by *Stone v. Powell*, 428 U.S. 465 (1976). The court also held that Boerckel procedurally defaulted on the fifth ground, since it was never raised on direct appeal to any state court, but that the sixth ground was properly presented and should be addressed on the merits. Finally, the court determined that Boerckel had procedurally defaulted on the first, second, and third grounds under *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985), because these grounds were not included in the petition for leave to appeal to the Illinois Supreme Court. These grounds were deemed procedurally barred because the time period in which Boerckel could have raised them to the Illinois Supreme Court had passed.

After these initial rulings, the district court requested additional briefing. Specifically, the court asked Boerckel to address the issue of cause for, or prejudice from, his procedural defaults on the first, second, third, and fifth grounds. The court also directed the State to respond to the merits of Boerckel's petition, which it had not done in its initial response. Boerckel did not articulate any cause for his procedural defaults. Instead, he argued that the court could hear his claims under the actual innocence or fundamental miscarriage of justice exception to the rule of procedural default.

On July 24, 1996, the court set the matter for hearing. At the hearing, Boerckel presented witnesses who testified that, in the years since his conviction, two men had made statements that they committed the rape for which Boerckel was convicted.

On October 28, 1996, the district court found that the recent amendments to 28 U.S.C. § 2254 prohibited an evidentiary hearing¹ and that the court must ignore the evidence presented at the hearing. The court added, however, that even if it believed the witnesses, their testimony would establish only that others were present at the time the crimes were committed, but not that Boerckel was not present. The district court further found that Boerckel had procedurally defaulted on his first, second, third, and fifth grounds for *habeas corpus* relief and that he failed to show cause for the default.

The district court denied the amended petition on October 28, 1996. JA 4. Boerckel filed a notice of appeal on November 27, 1996. The district court subsequently denied a certificate of appealability. However, the United States Court of Appeals for the Seventh Circuit granted a certificate of appealability on April 2, 1997. Then, on February 9, 1998, a panel of the United States Court of Appeals for the Seventh Circuit reversed the district court's dismissal of Boerckel's *habeas corpus*

¹ When the district court made this determination, it relied on the Court of Appeals' interpretation of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (holding that courts may apply the statute retroactively). This Court has subsequently reversed the Court of Appeals' interpretation of this issue. See *Lindh v. Murphy*, 521 U.S. 320 (1997).

petition and remanded for further proceedings. JA 23. Specifically, the court found that the exhaustion principle of 28 U.S.C. § 2254 does not require that a *habeas corpus* petitioner include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. JA 38, *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1202 (7th Cir. 1998). Based on this holding, the panel found it unnecessary to reach the question of whether the Illinois Supreme Court would find these claims procedurally barred because of its timing requirement. *Id.*

On March 9, 1998, O'Sullivan filed a petition for rehearing with suggestion for rehearing *en banc*. The petition was denied in an order dated March 20, 1998. JA 39. No judge in active service requested a vote thereon, and all of the judges on the original panel voted to deny rehearing. *Id.* The United States Court of Appeals for the Seventh Circuit issued its mandate on March 30, 1998.

On April 2, 1998, the district court issued an order indicating that three of the issues² which it had previously determined had been procedurally defaulted would need to be rebriefed. Accordingly, the district court ordered Boerckel to submit briefing on his asserted grounds for relief and O'Sullivan was directed to file a brief in response.

² The three issues were as follows: (1) that he did not knowingly and intelligently waive his *Miranda* rights; (2) that his confession was involuntary; and (3) that the evidence against him was insufficient to support a jury verdict.

On June 17, 1998, O'Sullivan filed a petition for a writ of *certiorari* with this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. On November 16, 1998, this Court granted the petition for writ of *certiorari*. On November 17, 1998, after two unsuccessful attempts to stay the proceedings before the district court, O'Sullivan filed an emergency motion for stay of the district court proceedings with this Court. And on November 20, 1998, this Court granted O'Sullivan's emergency motion to stay the proceedings before the district court, pending the resolution of the case in this Court.

SUMMARY OF ARGUMENT

This Court has consistently recognized the importance of federal-state comity in the context of *habeas corpus* proceedings. *Ex parte Royall*, 117 U.S. 241, 251 (1886); *Darr v. Burford*, 339 U.S. 200, 204 (1950); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*). In recent opinions, the Court has employed these doctrines as a rationale for balancing the judicial sovereignty of the states in the administration of criminal law against the interest of individuals who claim their state court convictions should be reviewed for federal constitutional violations. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). The Court's acknowledgment of these doctrines has included consideration of the fact that federal encroachment into state criminal trials frustrates both the states' ability to punish and their opportunity to understand and even-handedly apply federal constitutional principles. *Rose v. Lundy*, 455 U.S. 507, 518 (1982). O'Sullivan

posits that requiring state prisoners first to pursue federal constitutional claims to the state's highest court prior to seeking *habeas* review fosters notions of federalism and comity while preserving the writ's fundamental purpose of curing constitutional error. *See generally Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

The Court of Appeals' holding below conflicts with these important principles. Had the lower court adopted the approach urged by O'Sullivan, questioning first whether Boerckel had exhausted his state court remedies, before determining whether he had procedurally defaulted the three claims which he failed to raise on discretionary appeal to the state's highest court, its decision would have comported with the notions of federalism and comity as well as with this Court's jurisprudence. The fact that Boerckel failed to exhaust his state court remedies with respect to these three claims, when combined with the fact that the time-frame within which he might otherwise have exhausted those remedies had passed, should have led the Court of Appeals to conclude that he had procedurally defaulted.

Instead, the approach embraced below is akin to *Fay v. Noia*'s, 372 U.S. 391 (1963), deliberate bypass standard, which this Court renounced in *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977), since the former rule failed to accord the state rule the respect it deserved. Moreover, the decision of the court below was premised upon an unduly limited reading of 28 U.S.C. § 2254(c) and a misunderstanding of this Court's jurisprudence.

An individual need not be required to take redundant steps, such as petitioning for state collateral relief, prior to seeking federal *habeas* review. *See Brown v.*

Allen, 344 U.S. 443, 447, 448-49 n.3 (1953) (holding that the exhaustion doctrine does not require *habeas* petitioners to seek state collateral relief based upon the same evidence and issues once the state courts have already ruled on the claim on direct review) and *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). Urging a state prisoner to undertake a second line of attack upon his conviction would not promote comity. In fact, Illinois law would preclude such action. However, requiring him to complete a single layer of direct review by petitioning the state's highest court for relief certainly does. Moreover, such a requirement insures that the state's highest court maintains its influence over lower courts by allowing it to review and correct their federal constitutional errors.

This Court has candidly acknowledged its "historic willingness" to modify its earlier opinions on the scope of the writ of *habeas corpus*. *Wainwright*, 433 U.S. at 77-81. O'Sullivan is merely appealing to this Court to resolve a question, consistent with its jurisprudence concerning federal-state comity, which, until now, has been left unanswered. In response to the question presented here, this Court should hold that an individual who is in custody pursuant to a state criminal conviction may not pursue claims in a federal *habeas* petition if those claims were not raised on direct appeal in a petition for discretionary review to the state's highest court.

ARGUMENT

THE EVOLUTION OF THE REMEDY OF *HABEAS CORPUS*, IN GENERAL, AND THE DOCTRINE OF EXHAUSTION, IN PARTICULAR, JUSTIFY THE ENFORCEMENT OF A RULE REQUIRING PETITIONERS TO RAISE THEIR CLAIMS TO THE HIGHEST COURT OF THE STATE ON DIRECT APPEAL IN ORDER TO PRESERVE THOSE CLAIMS FOR FEDERAL COLLATERAL REVIEW.

Federal *habeas corpus* for state prisoners has been particularly controversial because "federal intrusions into state criminal trials frustrates both the State's sovereign power to punish and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). The doctrines of federalism and comity work generally to alleviate this controversy. Federalism provides for a system of government in which power is divided between at least two levels of sovereignty, a central government and multiple local governments, by a constitution consisting of both exclusive and concurrent powers. See generally Daniel A. Farber et al., *Constitutional Law* 773-74 (1993). And comity advises the courts of one jurisdiction to give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. See *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

The doctrine of exhaustion of state court remedies, which is premised upon the notion of federal and state court comity, requires federal *habeas corpus* petitioners to adequately present their claims to the state courts before seeking relief from the federal courts. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) (exhaustion rule is grounded in "[c]omity concerns"; "[t]he pur-

pose of exhaustion is . . . [to] afford the State a full and fair opportunity to address and resolve the [federal] claim on the merits"). "The exhaustion doctrine is principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518 (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973)); see also *Developments, Federal Habeas Corpus*, 83 HAR. L. REV. 1038, 1094 (1970) (cited favorably in *Braden*).

While the original meaning and application of the exhaustion doctrine is a matter of considerable controversy,³ this Court has stated that "[t]he purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Tamayo-Reyes*, 504 U.S. at 10.

A. The Court of Appeals' Holding Conflicts With Principles of Federalism And Comity.

This Court invoked the doctrines of federalism and comity in the exhaustion context in *Rose v. Lundy*, 455

³ See James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* Vol. 2 § 23.1 n.5 (2nd ed.); *Withrow v. Williams*, 507 U.S. 680, 720 (1993) (Scalia, J. concurring in part and dissenting in part); Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 1502 (3d ed. 1988 & Supp. 1992); *Withrow v. Williams*, 507 U.S. 680, 698 (O'Connor, J., concurring in part and dissenting in part) (citing *Ex parte Royall*, 117 U.S. 241, 251-53 (1886)).

U.S. 509 (1982). In *Rose*, this Court adopted a *per se* rule requiring federal district courts to dismiss every habeas corpus petition filed by a state prisoner under 28 U.S.C. § 2254 presenting unexhausted claims. *Id.* at 522. Under this "total exhaustion" rule, the petitioner could elect to return to state court to exhaust all claims, or to delete the unexhausted claims and proceed with those that have been exhausted in the state courts. *Id.* at 520-521.

In developing its policy arguments, the *Rose* Court relied upon a number of cases, illustrating that it had long recognized the importance of the exhaustion doctrine. The Court noted that in *Ex parte Royall*, 117 U.S. 241, 251 (1886), it held that although federal courts have the power to discharge a state prisoner restrained in violation of the Constitution, to facilitate accord between courts "equally bound to guard and protect rights secured by the Constitution," the federal court should abstain from proceeding on habeas corpus until the state court proceedings are completed. See *Rose*, 455 U.S. at 518. Next, citing *Darr v. Burford*, 339 U.S. 200, 204 (1950), the Court reiterated how "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Rose*, 455 U.S. at 518. Finally, the Court cited *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*) where it had commented that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Rose*, 455 U.S. at 518.

The majority closed its opinion by stating:

In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss *habeas* petitions containing both unexhausted and exhausted claims.

Id. at 522. Thus, the Court's conclusion in *Rose* underscored its determination to restrain the overly broad allowance of federal *habeas* review for state prisoners in order to promote the interests of comity and federalism.

With the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter, "AEDPA"), Congress has, admittedly, legislatively superseded the holding in *Rose* by providing as follows:

An application for a writ of *habeas corpus* may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(b)(2).

By means of this provision, federal courts may reach the merits of unexhausted claims, but only to deny *habeas corpus* relief. However, this amendment is consistent with the concepts of comity, federalism, and finality since it enables federal courts to endorse state court convictions without usurping the state courts' ability to correct their own errors of federal constitutional law. A federal district court may now advance the finality of a state court conviction by denying relief on unexhausted *habeas* claims. Nevertheless, the court still may not grant relief on such claims, but rather must dismiss a petition which contains potentially mer-

itorious, unexhausted claims. This permits the state courts to have the first opportunity to correct the error, in accordance with the doctrines of comity and federalism. Congress' enactment of this particular provision of the AEDPA is therefore mindful of federal-state comity. Furthermore, it corrects a concern which Justice Blackmun found to be inherently problematic in the *Rose* Court's plurality decision. In his concurrence, Justice Blackmun stated:

In some respects, the Court's ruling appears more destructive than solicitous of federal-state comity. Remitting a *habeas* petitioner to state court to exhaust a patently frivolous claim before the federal court may consider a serious, exhausted ground for relief hardly demonstrates respect for the state courts. The state judiciary's time and resources are then spent rejecting the obviously meritless unexhausted claim, which doubtless will receive little or no attention in the subsequent federal proceeding that focuses on the substantial exhausted claim. I can 'conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles.'

Rose, 455 at 525 (Blackmun, J., concurring) (quoting *Roberts v. LaVallee*, 389 U.S. 40, 43 (1967)).

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court recognized the subtle interplay between the concepts of exhaustion and procedural default. The *Coleman* Court reaffirmed the necessity of giving state courts the first opportunity to address allegations of constitutional error concerning state court convictions.

There, the Court discussed that, in the *habeas* context, application of the independent and adequate state law doctrine is grounded in concerns of comity and federalism. *Coleman*, 501 U.S. at 730. Moreover, the Court noted that when the independent and adequate state ground supporting a *habeas* petitioner's custody is a state procedural default, an additional concern comes into play, the exhaustion requirement. *Id.* at 731. Since exhaustion is also grounded in concerns of comity, this means that in a federal system, the states should have the first opportunity to address and correct alleged violations of state prisoners' federal rights. *Id.* (citing *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). The Court concluded that the same concerns apply to both exhaustion and procedural default. *Coleman*, 501 U.S. 731. It reasoned:

Just as in those cases in which a state prisoner fails to exhaust state remedies, a *habeas* petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A *habeas* petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. See 28 U.S.C. § 2254(b); *Engle v. Isaac*, 456 U.S. 107, 125-126, n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982). In the absence of the independent and adequate state ground doctrine in federal *habeas*, *habeas* petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state

ground doctrine ensures that the States' interests in correcting their own mistakes is respected in all federal *habeas* cases.

Id. at 732.

Much of the *Coleman* Court's discussion focused on the difficulty of crediting state court decisions since it is often unclear if the state law analysis was independent of federal law. The Court concluded that in ambiguous cases, federal courts may address the merits of the *habeas* petition if the decision of the last state court to which the petitioner presented his claims fairly appears to have rested primarily on federal law in resolution of those claims, or to have been interwoven with federal law, and does not clearly and expressly rely on an independent and adequate state ground. *Coleman*, 501 U.S. at 735. However, the Court stated that this rule does not apply in cases where the petitioner failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. *Id.* at 735 n.1. "In such a case there is a procedural default for purposes of federal *habeas* regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.* (citing *Harris v. Reed*, 489 U.S. 255, 269-270 (1989) (O'Connor, J., concurring); *Teague v. Lane*, 489 U.S. 288, 297-298 (1989)).

The exception to the rule announced in *Coleman* is precisely the situation in the instant case. Here, Boerckel failed to raise three claims to the Illinois Supreme Court which he subsequently raised in his federal *habeas corpus* petition. The time for filing the claims

had long since passed when he filed his federal *habeas* petition. See Illinois Supreme Court Rule 315(b). Thus, Boerckel's failure to exhaust state court remedies when he failed to include the three claims in his petition for leave to appeal to the Illinois Supreme Court should have precluded the Court of Appeals from remanding these three claims to the district court for a determination on the merits, since they had been procedurally defaulted.

The Court of Appeals' opinion here correctly notes that the key to evaluating this question requires a preliminary inquiry into whether Boerckel exhausted his state court remedies before any determination can be made as to procedural default. JA 33, *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1199 (7th Cir. 1998). It is precisely Boerckel's failure to exhaust, coupled with the fact that he no longer can exhaust, which ripens into a procedural default. See *Coleman*, 501 U.S. at 735 n.1.

The Court of Appeals attempted to "solve[] the puzzle of how many chances a petitioner must give the state courts to review his claims" by turning to the language of 28 U.S.C. § 2254(c). JA 33, *Boerckel*, 135 F.3d at 1199. However, in concluding that an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right (*id.* at 12), the Court of Appeals has read a limitation into the statute which is contrary to principles of federalism and comity.

The relevant language of the *habeas corpus* statute provides:

An applicant shall not be deemed to have exhausted the remedies available in the courts of

the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(c). This statutory formulation originally was enacted in 1948, incorporating the principles of the Court's decision in *Ex parte Hawk*, 321 U.S. 114 (1944).

On several occasions this Court has addressed the breadth of the provision's language "by any available procedure." On the one hand are cases such as *Brown v. Allen*, 344 U.S. 443, 447 (1953), and *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971), where this Court held that it would not interpret the language so literally as to require that a *habeas* petitioner take redundant steps in the state courts before filing federal *habeas* petitions. See also, *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991). On the other hand, in *Castille v. Peoples*, 489 U.S. 346 (1989), this Court rejected a *habeas* petitioner's assertion that he had fairly presented a claim by raising it for the first time on discretionary review to a State's highest court, noting as follows:

Although we have rejected a narrow interpretation of § 2254(c), we have not blue-penciled the provision from the text of the statute.

489 U.S. at 351. The case at bar presents a middle ground, since Boerckel did present the three contested claims to the intermediate appellate court, but failed to include them among those raised in his petition for leave to appeal to the Illinois Supreme Court, where a potential opportunity for relief existed.

O'Sullivan maintains that a requirement that a *habeas* petitioner raise his claims on discretionary re-

view to the state supreme court before filing a federal *habeas* petition is desirable, fosters notions of federalism and comity, and is consistent with other jurisprudence of this Court. O'Sullivan is not arguing that Boerckel should have been required to take a redundant action, such as those eschewed by this Court in *Brown* and *Wilwording*. Indeed, Illinois' Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.*, would preclude such a position, since post-conviction petitioners in Illinois may raise only state or federal constitutional claims which were not and could not have been raised on direct appeal. *People v. Neal*, 142 Ill.2d 140, 146 (1990), *cert. denied*, *Neal v. Illinois*, 502 U.S. 943 (1991).

A petition for leave to appeal, under Illinois Supreme Court Rule 315, and undoubtedly under like rules of many other states, is another layer of review on direct appeal in the state court system during which it is entirely possible that the litigant's federal constitutional rights may be vindicated. Requiring use of this remedy as a precursor to filing federal *habeas corpus* petitions is desirable, since it may obviate the need for some cases or issues to even come to federal court, and will allow the lower state courts to be guided in their understanding of federal constitutional principles by the highest state courts. These considerations are the essence of comity and federalism. *Tamayo-Reyes*, 504 U.S. at 10. Any contrary holding which excuses the presentation of issues ultimately brought on federal *habeas corpus* appears inconsistent with the cause and prejudice standard enunciated in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and more closely resembles a return to the deliberate bypass standard of *Fay v. Noia*, 372

U.S. 391 (1963). Additionally, a contrary holding will leave state prisoners with little incentive to petition the state supreme courts.⁴ This, in turn, will denigrate the importance of those courts, by depriving them of the opportunity to correct federal constitutional errors and to guide their own lower courts with respect to these important principles. See Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1225-26 (1995) (authored by Matthew L. Anderson).

Some federal courts which hold that *habeas* petitioners need not seek discretionary review in the states' highest courts base such holdings on the unlikelihood of a petitioner obtaining review on the merits of his claims. See, e.g., *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984). In fact, the Court of Appeals' interpretation seems to have been borne out of its reliance upon just such a case. See JA 34, *Boerckel*, 135 F.3d at 1200 (citing *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994)). Boerckel would appear hard-pressed to promote such a theory. He obviously recognized leave to appeal as a desirable vehicle of review, since he actually filed a petition for leave to appeal to the Illinois Supreme

⁴ Of course, prisoners believing the state supreme court is more likely to provide relief than federal courts have an incentive to petition for discretionary review. Conventional wisdom, however, is that federal courts are more receptive to federal constitutional issues and exercise more independent judgment. See Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1022-24 (1985) (distinguishing the interests of federal and state judges).

Court, albeit one not raising the claims in question.⁵ Even were it otherwise, the notion that a discretionary court is not an "available procedure" in which to advance an issue is simply untrue. Assuming that only a small percentage of cases are accepted for discretionary review,⁶ the fact remains that cases are accepted on discretionary review by the states' highest courts, and that some federal *habeas corpus* cases undoubtedly will be obviated by the acceptance of some of those cases. See Note, *Requiring Unwanted Habeas*, *supra*, at 1225.

The assertion that the unlikelihood of obtaining review on the merits justifies discounting state discretionary review as "any available procedure" would argue equally in favor of liberally construing "the highest state court in which a decision could be had" language which governs this Court's jurisdiction. 28 U.S.C. § 1257(a). Yet, this Court jealously guards its jurisdiction, and for precisely the same reasons that the exhaustion doctrine exists in federal *habeas corpus*. In *Costarelli v. Massachusetts*, 421 U.S. 193 (1975) (*per curiam*), in which this Court dismissed the appeal of a Massachusetts litigant who had not taken advantage of that state's second tier of a "two-tier" system for trial of certain criminal charges, this Court stated:

It is thus clear that Costarelli can raise his constitutional issues in Superior Court by a motion

⁵ Boerckel also went further, seeking the extraordinary remedy of a writ of *certiorari* from this Court. See *Boerckel v. Illinois*, 447 U.S. 911 (1980).

⁶ Of course, the availability of review in state supreme courts may fluctuate due to changes in court rules, statutes, and even state constitutions.

to dismiss, and can obtain state appellate review of an adverse decision through the state high court. That the issue might be mooted by his acquittal in Superior Court is, of course, without consequence, since an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved. (Citations omitted).

421 U.S. at 196. The exhaustion requirement in *habeas* practice is rooted in that precise concern for federalism and comity.

A requirement that a future *habeas* petitioner take his claims to a state's discretionary supreme court is not particularly burdensome. In Illinois, for example, a litigant has between 21 and 35 days after the intermediate reviewing court's decision in which to file a petition for leave to appeal. Illinois Supreme Court Rule 315(b). Since the Illinois Supreme Court convenes five terms a year (705 ILCS 10/12), petitions for leave to appeal do not remain pending for an inordinate amount of time. Thus, if a petition is deemed unworthy of a grant of review, the petitioner will be in a position to seek federal *habeas* relief relatively quickly. On the other hand, if a petition is allowed, there remains a distinct possibility that the criminal appellant will gain relief from his conviction in the state courts.

In the proceedings below, the Court of Appeals held that the exhaustion principle of 28 U.S.C. § 2254 does not require a *habeas corpus* petitioner to include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. JA 38, *Boerckel v. O'Sullivan*, 135

F.3d 1194, 1202 (7th Cir. 1998). It then reversed the district court's dismissal of Boerckel's *habeas* petition and remanded for further proceedings. *Id.* In reaching this conclusion, the Court of Appeals noted, and partially relied upon, its own decision in *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996). JA 30-31, 38, *Boerckel*, 135 F.3d at 1198-1199, 1202. In *Hogan*, the Court of Appeals suggested that this Court's decisions in *Harris v. Reed*, 489 U.S. 255 (1989), *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), and *Coleman v. Thompson*, 501 U.S. 722 (1991), had invalidated prior caselaw in which the Court of Appeals required a *habeas* petitioner to seek review in the state's highest court on pain of forfeiture, specifically, *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985). *Hogan*, 74 F.3d at 146.

Reliance upon *Harris* to support that position was flawed. In *Harris*, this Court addressed whether an ambiguous statement by the Illinois Appellate Court on post-conviction review constituted an independent and adequate state ground sufficient to bar consideration of the merits of the claim in a federal *habeas* proceeding. In its factual recitation, the Court noted that Harris "did not seek review in the Supreme Court of Illinois." 489 U.S. at 258. Then, the Court adopted the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as the test for determining in a federal *habeas corpus* proceeding whether the state court's holding rested on an independent and adequate state ground. Finding no such plain statement in the Illinois Appellate Court's decision, the Court remanded the case for further proceedings, presumably a review of the merits.

Apparently, the *Hogan* court inferred that, since Harris did not seek leave to appeal, yet his claim survived procedural default, this Court would not require an Illinois petitioner to seek discretionary appeal to the state supreme court for exhaustion purposes. Yet, there is no indication in that decision that the government raised the claim that Harris' failure to have sought discretionary review constituted a failure to exhaust. And review of the Brief for Respondents in that case has confirmed that the Respondents did not promote such a claim. Brief For Respondents, *Harris v. Reed*, No. 87-5677, October Term, 1987.⁷

The *Hogan* court's reliance upon *Ylst* to support its position that it is unnecessary to seek review by the highest state court is similarly misplaced. The *Ylst* Court never addressed the question of whether the petitioner was required to exhaust his state court remedies by bringing them before the state's highest court. Nor would the *Ylst* Court have been called upon to decide that question, because the petitioner did in fact seek discretionary review before seeking the collateral relief which this Court deemed unnecessary. *Ylst*, 501 U.S. at 799. The question presented there was merely whether an unexplained order could serve to remove a procedural bar which would otherwise preclude *habeas* review on the merits. *Id.* at 802. Further, as shown above, a

⁷ O'Sullivan maintains that, for purposes of evaluating whether an individual has exhausted state court remedies, there is no legally significant difference between direct appeal and post-conviction appeal. The question of the necessity of seeking discretionary review from the state's highest court in the post-conviction context is pending before this Court in *Godinez v. White*, No. 98-477.

careful reading of *Coleman* is entirely inconsistent with the Court of Appeals' finding.

The Court of Appeals purported to draw support for its conclusion from the fact that Illinois discourages litigants from raising every possible claim of error on discretionary review which it determined substantiated its conclusion that Illinois does not consider it necessary that petitioners raise all of their claims in order to exhaust their remedies. JA 34, *Boerckel*, 135 F.3d at 1200. First, it is irrelevant whether Illinois considers it necessary that petitioners raise every possible claim of error in order to exhaust their remedies, because the exhaustion doctrine, rooted as it is in a federal statute, is of necessity a federal question. See *Jennison v. Goldsmith*, 940 F.2d 1308, 1310-1311 (9th Cir. 1991) (*per curiam*). Further, the fact that the Illinois Supreme Court encourages selective presentation of issues is consistent with the fact that federal *habeas corpus* is itself an extraordinary remedy. The district courts in the Seventh Circuit annually receive more than a thousand petitions for writs of *habeas corpus*, yet they grant only 1.5 percent of them. Don R. Sampen, *Defendant fails to preserve federal claim*, *Chicago Daily Law Bulletin*, June 3, 1997 at 6, col. 2.

Additionally, the Court of Appeals noted that Illinois recognizes that its Supreme Court practice is similar to this Court's *certiorari* procedure. *Id.* at 34-35 (citing Illinois Supreme Court Rule 315 Comm. Cmts). But there is an important distinction between requiring a prisoner to file a petition for writ of *certiorari* and requiring him to file a petition for leave to appeal for purposes of exhaustion. As has already been discussed,

exhaustion is rooted in concerns of federalism and comity. This means that the state courts should be given the first opportunity to examine and correct errors of federal constitutional concern which result from state court convictions. Requiring a prisoner to file for *certiorari* does not advance these interests. However, allowing the highest state court to review a state court conviction clearly does.

A "rigorously enforced total exhaustion rule" provides state courts with every possible opportunity to correct a constitutional error. *Rose*, 455 U.S. at 518-19. Strict enforcement of the exhaustion requirement furthers the purposes of exhaustion, and promotes the various state, federal, and prisoner interests involved, by providing state courts with ample opportunity to correct constitutional violations and by ensuring consolidation of prisoners' multiple claims. The Court of Appeals' holding here stands in stark contrast to these well-settled principles.

B. The Rule Proposed By O'Sullivan Would Be Consistent With This Court's Recent Precedents In Habeas Corpus Law.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court summarized briefly the four typical areas of inquiry in federal *habeas corpus* cases involving state court convictions, then acknowledged its "historic willingness to overturn or modify its earlier views of the scope of the writ" of *habeas corpus*. 433 U.S. at 77-81. Indeed, there is little question that this Court has overturned or modified its views on the scope of *habeas corpus* law in the past 20 to 25 years, and virtually each time that it

has done so, the rationale for doing so has been out of interests of federalism and comity. The Court's subsequent decisions have established procedural limits on federal *habeas corpus* review that have sought to balance the state's interest in the administration of criminal justice with the writ's fundamental purpose of curing constitutional error. These are the same concepts presented in this case. And, in this case, adoption of O'Sullivan's position requires no overturning or modification of the Court's caselaw.

In 1963, the Court issued a trilogy of cases which expanded the scope of federal *habeas corpus* review. As was stated in the first of these cases, *Fay v. Noia*, 372 U.S. 391, 411-412 (1963), the Court has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ. Our development of the law of federal *habeas corpus* has been attended, seemingly with some backing and filling." *Fay* held that a state petitioner's failure to comply with a state procedural requirement, sufficient to preclude state court appellate review, would bar subsequent resort to the federal court only if the petitioner had deliberately bypassed state procedural requirements.⁸ The Court held that federal courts have the power to grant *habeas corpus* relief despite a petitioner's failure to exhaust a state court remedy no longer available when his *habeas corpus* petition is filed. *Fay*, 372 U.S. at 399.

⁸ *Fay* also overruled the holding of *Darr v. Burford*, 339 U.S. 200 (1950), that a state prisoner must ordinarily seek *certiorari* in the Supreme Court prior to applying for federal *habeas corpus* review. *Fay*, 372 U.S. at 435-38.

Townsend v. Sain, 372 U.S. 293 (1963), the second case of the 1963 trilogy, clarified the considerations that should govern the grant or denial of evidentiary hearings in federal *habeas corpus* proceedings. And in *Sanders v. United States*, 373 U.S. 1 (1963), the Court considered the standards by which a federal court should determine whether to grant a hearing on a second or successive motion of a federal prisoner under 28 U.S.C. § 2255.

Together, *Fay*, *Townsend*, and *Sanders* established broad standards for the exercise of federal *habeas corpus* review. See Mary Ann Snow, Comments, *Lundy Isaac and Frady: A Trilogy of Habeas Corpus Restraint*, 32 CATH. U. L. REV. 169, 203 (1982). Since those cases, however, this Court has markedly changed its direction.

In *Francis v. Henderson*, 425 U.S. 536 (1976), the Court acknowledged a federal court's power to entertain a *habeas corpus* petition even where the claim has been procedurally waived in state proceedings, but nonetheless examined the appropriateness of the exercise of that power and recognized, as it had in *Fay*, that considerations of comity and concerns for the orderly administration of criminal justice may in some circumstances, require a federal court to forego the exercise of its *habeas corpus* power. *Francis*, 425 U.S. at 538-539.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court firmly curtailed the broad availability of federal *habeas* review for state prisoners in cases of procedural default. The *Sykes* Court renounced the deliberate bypass waiver standard enunciated in *Fay v. Noia*, 372 U.S. 391 (1963), stating that the state rule deserved more

respect than the *Fay* standard accorded it. *Sykes*, 433 U.S. at 88. After *Sykes*, a *habeas* petitioner was required to demonstrate both cause and actual prejudice to excuse a failure to comply with an adequate state procedural requirement, which would otherwise operate to bar federal collateral review.

In *Engle v. Isaac*, 456 U.S. 107 (1982), the Court extended the *Sykes* cause and actual prejudice standard for excusing procedural defaults of state petitioners to claims of error that may have affected the determination of guilt at trial. In applying the cause and actual prejudice standard, the *Isaac* Court first ruled that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial," even if the state court has previously rejected that constitutional argument. *Id.* at 130. The Court explained:

If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.

Isaac, 456 U.S. at 130.

The Court likened the decision to withhold a known constitutional claim to the type of deliberate bypass condemned in *Fay*. *Isaac*, 456 U.S. at 130 n.36. Moreover, it stated that "[s]ince the cause-and-prejudice

standard is more demanding than *Fay*'s deliberate bypass requirement, we are confident that perceived futility alone cannot constitute cause." *Id.* (internal citation omitted). Thus, the application of the cause and prejudice requirement to constitutional claims that affect the truth finding function at trial was justified in *Isaac* to balance the *habeas* petitioner's interest in review of his constitutional claims against the state's interest in administering its criminal justice system without unwarranted federal court interference.

In *Teague v. Lane*, 489 U.S. 288 (1989) the Court stated:

We agree with Justice Harlan's description of the function of *habeas corpus*. "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of a crime is afforded a trial free of constitutional error." *Kuhlmann v. Wilson*, 477 U.S. 436, 447, 106 S.Ct. 2616, 2623, 91 L.Ed. 2d 364 (1986) (plurality opinion). Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of *habeas* review. Thus, if a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal *habeas* only if the defendant shows cause for the default and actual prejudice resulting therefrom.

Id. at 308 (citing *Wainwright v. Sykes*, 433 U.S. at 87-91).

In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Court rejected *Fay*'s deliberate bypass standard in favor

of a cause and prejudice standard for excusing a *habeas* petitioner's failure to develop a material fact in state court proceedings. *Id.* at 5. The Court reasoned that it would be irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim. *Id.* at 7-8. Moreover, and more important to the issue presented here, the Court justified its holding in light of concerns of finality, comity, judicial economy and channeling the resolution of claims into the most appropriate forum. *Id.* at 8.

The decisions in *Francis*, *Sykes*, *Isaac*, *Teague*, and *Tamayo-Reyes* illustrate the Court's progression in applying the doctrines of federalism and comity to limit unjustified interference with state criminal convictions on federal *habeas corpus* review. Requiring an individual who is in custody pursuant to a state criminal conviction to raise all of his claims in a petition for discretionary review to the state's highest court before he may pursue claims in a federal *habeas* petition fosters these same concerns.

This Court intended the exhaustion doctrine to increase judicial efficiency. *Harris*, 489 U.S. at 255, 269 (O'Connor, J., concurring); *Rose*, 455 U.S. at 519 (noting that state courts create complete factual records that facilitate federal review). By requiring exhaustion of state remedies, federal courts encourage state courts to make, develop, and document factual and legal findings involved in prisoners' petitions. *Harris*, 489 U.S. at 269 (O'Connor, J., concurring) (citing *Rose*, 455 U.S. at 518-19). In addition, requiring exhaustion fosters an orderly process for *habeas* appeals forcing prisoners to pursue

all the remedies in one forum before pursuing remedies in another and by allowing prisoners to make only one transition between the two forums. Moreover, as prisoners work through the process, they may abandon *habeas* claims if state courts provide sufficient relief, or they may refine and clarify their *habeas* petitions through additional state court appeals, thereby reducing or eliminating the federal courts' duties. Judicial efficiency benefits state and federal courts as well as prisoners, who prefer to have their claims heard and resolved as quickly as possible. See *Rose*, 455 U.S. at 519-20.

In *Hogan*, the Court of Appeals expressed concern that, since defendants do not have a constitutional right to counsel on discretionary review, "treating an omission from a petition for a discretionary hearing as a conclusive bar to federal review under § 2254 could create a trap for unrepresented prisoners. . ." *Hogan*, 74 F.3d at 147. The Court of Appeals reiterated that concern in this case. JA 38, *Boerckel*, 135 F.3d at 1202. The Court of Appeals' concern is unnecessary. Since a defendant on appeal to the Illinois Appellate Court is entitled to counsel as of right, any relevant claims regarding trial court error are appropriately raised on that appeal. An unrepresented prisoner on discretionary review has the benefit of being able to raise those claims previously alleged on direct appeal where he had counsel. Moreover, a prisoner may not raise a claim for the first time on discretionary review. See *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Thus, there is little risk that an unrepresented petitioner will be unable to present the perfected claims to the state's highest court.

Requiring a prisoner to apply for discretionary review from the state supreme court, the approach embraced by a majority of the federal circuit courts of appeals,⁹ insures that the states have the opportunity to participate in the development of federal and constitutional law. This majority approach also favors the federal courts' interest in judicial efficiency. These important concerns, upon which the doctrine of exhaustion is rooted, should encourage this Court to reject the Court of Appeals' approach and, instead, require exhaustion to the state's highest court on direct appeal.

⁹ See *McNeeley v. Arave*, 842 F.2d 230, 231 (9th Cir. 1988); *Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) (*per curiam*); *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985); *Dulin v. Cook*, 957 F.2d 758, 759 (10th Cir. 1992); *Grey v. Hoke*, 933 F.2d 117, 119 (2nd Cir. 1991); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993); *Townsend v. Commissioner*, No. 94-1270, 1994 U.S. App. LEXIS 9750, at *2 (1st Cir. May, 1994) (unpublished opinion); *Caswell v. Ryan*, 953 F.2d 853, 861 (3rd Cir. 1992); *but see Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984); *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994).

CONCLUSION

For the aforementioned reasons, Petitioner, William D. O'Sullivan, respectfully requests this Court to find that the United States Court of Appeals for the Seventh Circuit erred in holding that an individual who is in custody pursuant to a state criminal conviction may pursue claims in a federal *habeas* petition despite the fact that he failed to raise those claims on direct appeal in a petition for discretionary review to the state's highest court, and order the affirmance of the United States District Court's decision denying federal *habeas* relief.

Respectfully submitted,

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM D. O'SULLIVAN,
v. *Petitioner,*
DARREN BOERCKEL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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QUESTION PRESENTED

MAY AN INDIVIDUAL WHO IS IN CUSTODY PURSUANT TO A STATE CRIMINAL CONVICTION PURSUE CLAIMS IN A FEDERAL HABEAS PETITION IF THOSE CLAIMS WERE NOT RAISED ON DIRECT APPEAL IN A PETITION FOR DISCRETIONARY REVIEW TO THE STATE'S HIGHEST COURT?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
SUMMARY OF ARGUMENT	1
ARGUMENT	3
<p>AN INDIVIDUAL WHO IS IN CUSTODY PURSUANT TO A STATE CRIMINAL CONVICTION SHOULD NOT BE BARRED FROM PURSUING CLAIMS IN A FEDERAL HABEAS PETITION IF THOSE CLAIMS WERE NOT RAISED ON DIRECT APPEAL IN A PETITION FOR DISCRETIONARY REVIEW TO THE STATE'S HIGHEST COURT</p>	
<p>A. Absent a State Rule Requiring That a Prisoner Present an Issue in a Petition for Discretionary Review on Penalty of Forfeiture, the Federal Courts Should Not Require State Prisoners To Seek Discretionary Review From State Supreme Courts Prior to Instituting Federal Habeas Proceedings</p>	3
<p>B. Where a State Has Formally Adopted a Rule Stating the Factors That Will Guide Its Discretion in Deciding Whether To Grant Discretionary Review, the Federal Courts Should Not Require State Prisoners To Ignore the State's Rule To Avoid Forfeiture of Claims in Federal Habeas Corpus Proceedings</p>	4
<p>C. Since No Firmly Established State Procedure Was Violated, There Was No Procedural Default</p>	7

TABLE OF CONTENTS—Continued

	Page
D. Federalism Would Be Offended by the Adoption of the Illinois Attorney General's Position That State Prisoners Must Disregard Rules Promulgated by the State Supreme Courts	8
E. Prisoners Should Not Be Required to Petition for Discretionary Supreme Court Review of General Claims of Error, Especially When a State Rule Discourages Such a Practice, in Order To Exhaust Their Claims	14
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
<i>Boerckel v. O'Sullivan</i> , 135 F.3d 1194 (7th Cir. 1998)	<i>passim</i>
<i>Brown v. Allen</i> , 344 U.S. 443 (1953)	17
<i>Buck v. Green</i> , 743 F.2d 1567 (11th Cir. 1984)	7, 12
<i>Castille v. Peoples</i> , 489 U.S. 346 (1989)	17-18
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	<i>passim</i>
<i>County Court of Ulster County, N.Y. v. Allen</i> , 442 U.S. 140 (1979)	7, 10, 13
<i>Dolny v. Erickson</i> , 32 F.3d 381 (8th Cir. 1994)	12, 18
<i>Ex Parte Royall</i> , 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886)	16
<i>Fay v. Noia</i> , 372 U.S. 391 (1963), <i>overruled on other grounds</i> , <i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977) and <i>abrogated by Coleman v. Thompson</i> , 501 U.S. 722 (1991)	14, 17
<i>Freeman v. Commonwealth</i> , 697 S.W.2d 133 (Ky. 1985)	13
<i>Hogan v. McBride</i> , 74 F.3d 144, <i>modified on rehearing</i> , 79 F.3d 578 (7th Cir. 1996)	11
<i>In Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases</i> , 321 S.C. 563, 471 S.E.2d 454 (S.C. 1990)	13, 18
<i>James v. Kentucky</i> , 466 U.S. 341 (1984)	7, 10, 13
<i>Murray v. Carrier</i> , 477 U.S. 478 (1986)	10, 13
<i>People v. Boerckel</i> , 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th Dist. 1979)	11
<i>People v. Edgeworth</i> , 30 Ill. App. 3d 289, 332 N.E.2d 716 (1st Dist. 1975)	5, 7, 9
<i>Picard v. Connor</i> , 404 U.S. 270 (1971)	16-17
<i>Smith v. White</i> , 719 F.2d 390 (11th Cir. 1983)	12
<i>State v. Sandon</i> , 161 Ariz. 157, 777 P.2d 220 (Ariz. 1989)	13, 18
<i>Stewart v. Martinez-Villareal</i> , 118 S.Ct. 1618 (1998)	16
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	14, 17
<i>Williams v. Wainwright</i> , 452 F.2d 775 (5th Cir. 1971)	12
<i>Wilwording v. Swenson</i> , 404 U.S. 249 (1971)	17-18

TABLE OF AUTHORITIES—Continued

STATUTES	Page
28 U.S.C. § 2254	2, 7, 12, 16-18
735 ILCS 5/1-104	8
 RULES	
Ariz. R. Crim. P. 32.1	13
Ill. S. Ct. R. 315(a)	<i>passim</i>
Ill. S. Ct. R. 315 Comm. Cmts.	5
Pa. Rule App. Proc. 1114	17
 OTHER AUTHORITIES	
Annual Report of the Illinois Courts Statistical Summary—1997	2, 14
Illinois Const. of 1970, Article II, Section 1	19
Illinois Const. of 1970, Article VI, Section 1	8
Illinois Const. of 1970, Article VI, Section 16	8

SUMMARY OF ARGUMENT

The Illinois Attorney General's brief incorrectly casts this case in terms of exhaustion, when it is really arguing for procedural default. The Attorney General acknowledges that Boerckel has no way of seeking state review of the claims at issue in this case. Boerckel has not procedurally defaulted his claims because procedural default occurs only when a prisoner fails to comply with a firmly established state rule. In this case, the Attorney General's complaint is based not on a claim that Boerckel failed to follow a state rule, but on the fact that Boerckel did not disregard Ill.S.Ct.R. 315(a).

Illinois recognizes that the practice of the Illinois Supreme Court regarding discretionary review is similar to this Court's *certiorari* practice. Consistent with this Court's *certiorari* practice, a prisoner should not be penalized for screening the claims he seeks to present to the Illinois Supreme Court in accordance with that court's rule. Adopting the position urged by the Attorney General and requiring prisoners to disregard the Illinois Supreme Court's rule or forfeit their right to federal habeas review would burden the state supreme courts for little or no benefit to the federal courts. Moreover, it would be inequitable to punish prisoners for following the rules adopted by the state.

Illinois does not require that claims be presented in a petition for leave to appeal on pain of forfeiture, and it had no such requirement at the time Boerckel filed his petition for leave to appeal. In fact, Ill.S.Ct.R. 315(a) discourages prisoners from presenting all possible claims in a petition for leave to appeal, channeling routine claims of error to the intermediate appellate courts and reserving the resources of the state supreme court for questions of broader significance. Boerckel complied with Ill.S.Ct.R. 315(a) when he prepared his petition for leave to appeal. He has not violated any firmly established state rule.

The position urged by the Illinois Attorney General is inconsistent with recognized principles of comity and federalism. The Illinois Constitution and the Illinois legislature have granted the Illinois Supreme Court the power to establish rules of practice and procedure for the courts. The Illinois Supreme Court adopted Ill.S.Ct.R. 315(a) which discourages litigants from presenting every possible claim in a petition for leave to appeal. An Illinois appellate court has held that the doctrine of waiver is inappropriate to petitions for leave to appeal. The Illinois Attorney General is requesting that this Court override the Illinois Constitution, the Illinois legislature, the rule adopted by the Illinois Supreme Court and an Illinois appellate court decision and impose a contrary rule in the name of federalism and comity. As the Seventh Circuit succinctly put it, such a result "would turn federalism on its head." *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1201 (7th Cir. 1998); JA 37.

Although this is not an exhaustion case, Boerckel observes that the Attorney General's exhaustion arguments are incorrect. Given the fact that Illinois' practice regarding petitions for leave to appeal is consistent with this Court's *certiorari* practice, a claim should not be forfeited if it is not included in a petition for leave to appeal, particularly if the claim does not comport with the factors set out in a rule regarding discretionary review.

The Attorney General's argument that this case falls under the exception discussed in footnote one of *Coleman v. Thompson*, 501 U.S. 722 (1991) is misplaced. The exception discussed in *Coleman* was intended to make clear that a prisoner who forfeits a claim cannot avoid procedural default by manipulative litigation. Boerckel handled his claims in compliance with the state's rule. Moreover, the plain language of 28 U.S.C. § 2254(c) describes forfeiture in terms of the "right" to present an issue. By definition, a litigant does not have the right to present an issue if review is discretionary. Rather,

the litigant has at most the right to explain why the court should allow the litigant to present the issue. Where, however, the claim does not comport with factors set out in the rule governing discretionary review, it is arguable whether the litigant even has the right to seek review. In fact, adoption of a system of guided discretionary review which channels routine claims of error to the intermediate appellate courts and reserves the resources of the state's highest court for questions of broad significance could fairly be viewed as a waiver of the state's right to have every claim of error presented to the state's highest court.

Because requiring state prisoners to disregard state procedural rules on pain of forfeiture of their rights to federal habeas review offends principles of comity and federalism, the position of the Illinois Attorney General should be rejected and the decision below should be affirmed.

ARGUMENT

AN INDIVIDUAL WHO IS IN CUSTODY PURSUANT TO A STATE CRIMINAL CONVICTION SHOULD NOT BE BARRED FROM PURSUING CLAIMS IN A FEDERAL HABEAS PETITION IF THOSE CLAIMS WERE NOT RAISED ON DIRECT APPEAL IN A PETITION FOR DISCRETIONARY REVIEW TO THE STATE'S HIGHEST COURT

A. Absent a State Rule Requiring That a Prisoner Present an Issue in a Petition for Discretionary Review on Penalty of Forfeiture, the Federal Courts Should Not Require State Prisoners To Seek Discretionary Review From State Supreme Courts Prior to Instituting Federal Habeas Proceedings

Initially, it should be observed that despite the emphasis the Attorney General's brief places on the exhaustion doctrine, this case turns not on a question of exhaustion, but on a question of procedural default. In fact, the Attorney General recognizes that Mr. Boerckel can no

longer present the claims in this case in a petition for leave to appeal to the Illinois Supreme Court. Pet. Brf. 16. The Attorney General leaps to the conclusion that, since it is no longer possible to present the issues in this case to the Illinois Supreme Court, they are procedurally defaulted. *Id.* However, as discussed below, that conclusion is erroneous because procedural default results from the failure to comply with a firmly established state rule.

In this case, Boerckel complied with Ill.S.Ct.R. 315(a), a procedural rule that reserves the resources of the Illinois Supreme Court for questions of broad significance and channels routine claims of error to the intermediate appellate courts. As the Seventh Circuit pointed out, it would be inequitable to penalize a prisoner for following the state's rule. *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1201 (7th Cir. 1998); JA 37.

Thus, a state prisoner should not have to present an issue in a petition for discretionary review to avoid forfeiture of the issue in federal habeas proceedings.

B. Where a State Has Formally Adopted a Rule Stating the Factors That Will Guide Its Discretion in Deciding Whether To Grant Discretionary Review, the Federal Courts Should Not Require State Prisoners To Ignore the State's Rule To Avoid Forfeiture of Claims in Federal Habeas Corpus Proceedings

As the Seventh Circuit discussed in *Boerckel*, Ill.S.Ct.R. 315(a) states that the criteria used by the Illinois Supreme Court in determining whether to grant a petition for leave to appeal include:

the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's super-

visory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Boerckel, 135 F.3d at 1200; JA 34.

While Rule 315(a) states that whether a petition for leave to appeal will be granted "is a matter of sound judicial discretion," the criteria set forth in the rule effectively puts petitioners on notice that the Illinois Supreme Court will exercise its discretion to resolve questions of law for the lesser state courts, but will not exercise its discretion to review the application of the law to individual cases.

The three claims at issue in Boerckel's appeal to the Seventh Circuit were: 1) whether he knowingly and intelligently waived his *Miranda* rights; 2) whether his confession was involuntary; and 3) whether the evidence against him was insufficient to support a guilty verdict. *Boerckel*, 135 F.3d at 1196; JA 26-27. The omission of these claims in Boerckel's petition for leave to appeal to the Illinois Supreme Court was consistent with Ill.S.Ct.R. 315(a). These are fact-specific questions, rather than questions of "general importance." They do not involve "a conflict between the decision sought to be reviewed and a decision of the [Illinois] Supreme Court, or of another division of the Appellate Court." Likewise they do not raise "the need for the exercise of the [Illinois] Supreme Court's supervisory authority." Thus, Boerckel complied with Ill.S.Ct.R. 315(a) in omitting these issues from his petition for leave to appeal to the Illinois Supreme Court. Because he has not violated any state rule, Boerckel has not procedurally defaulted.

Illinois recognizes that the practice of the Illinois Supreme Court regarding petitions for leave to appeal is similar to this Court's *certiorari* procedure. *Boerckel*, 135 F.3d at 1200 (citing Ill.S.Ct.R. 315 Comm. Cmts); JA 35. See also, *People v. Edgeworth*, 30 Ill. App. 3d 289, 293, 332 N.E.2d 716, 719, (1st Dist. 1975). "To

remain consistent with *certiorari* practice, Boerckel's decision not to include all of his claims does not bar him from federal habeas relief." *Boerckel* at 1200; JA 35. As the Seventh Circuit noted in its opinion:

Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. . . . Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.

Boerckel, 135 F.3d at 1201; JA 37.

It should also be noted that a rule requiring state prisoners to petition for discretionary review of all claims on penalty of the forfeiture of those claims in federal habeas corpus proceedings will result in state supreme courts being inundated with petitions to review all possible claims regardless of how the state has tried to define the scope of its discretionary review.¹ This Court should decline to establish such a rule "for it would place burdens on the States and state courts in exchange for very little benefit to the federal courts."² *Coleman v. Thomp-*

¹ While in *Boerckel*'s case, Ill.S.Ct.R. 315(a) merely narrowed the claims included in the petition for leave to appeal, in cases where there are only routine claims of error, adherence to the rule will spare the Illinois Supreme Court from having to review unnecessary petitions.

² In both 1996 and 1997, the total number of petitions for leave to appeal and appeals as of right in criminal cases filed with the Illinois Supreme Court exceeded one thousand. Approximately 3% of these were allowed (32 of 1,063 in 1996 and 31 of 1,068 in 1997). Annual Report of the Illinois Courts Statistical Summary—1997 p. 151, Table 2. In Illinois, convictions resulting in the imposition of the death penalty are appealed directly to the Illinois Supreme Court. Annual Report of the Illinois Courts Statistical Summary—1997 p. 150, Table 1, footnote (a).

son, 501 U.S. 722, 738 (1991). As the Eleventh Circuit has observed, the requirements of 28 U.S.C. § 2254 "are rooted in the doctrine of comity and should not be so construed as to burden the state system with meaningless petitions for relief to forums which are not intended by state law to consider them." *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984).

C. Since No Firmly Established State Procedure Was Violated, There Was No Procedural Default

Illinois caselaw at the time of *Boerckel*'s petition for leave to appeal to the Illinois Supreme Court and at present does not require that an issue be presented in a petition for leave to appeal to the Illinois Supreme Court to preserve the issue for federal review. As discussed in the Seventh Circuit's opinion, *People v. Edgeworth*, 30 Ill. App. 3d 289, 294, 332 N.E.2d 716, 720 (1st Dist. 1975), stated that a petition for leave to appeal "is not necessarily an adversary proceeding to which the application of . . . the doctrine of waiver . . . is appropriate." *Boerckel*, 135 F.3d at 1198; JA 31.

Procedural default is based on a petitioner's failure to comply with a state court procedural rule. *James v. Kentucky*, 466 U.S. 341, 348-51 (1984) established that only a "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent review by the Supreme Court of a federal constitutional claim. Where a state has adopted a rule that discourages convicted defendants from petitioning the state's highest court for review of certain types of claims, it cannot be said that the state had a "firmly established and regularly followed state practice" that such claims had to be presented to the state's highest court. See *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 147-54 (1979) ("New York has no clear contemporaneous-objection policy that applies in this case. No New York court, either in this litigation or in any

other case that we have found, has ever expressly refused on contemporaneous-objection grounds to consider a post-trial claim such as the one respondents made.") (footnote omitted).

Boerckel has not failed to comply with any clearly established state practice. He presented all his issues to the Illinois appellate court in his appeal as of right and complied with Illinois Supreme Court Rule 315(a) in his selection of issues for his petition for leave to appeal to the Illinois Supreme Court.

D. Federalism Would Be Offended by the Adoption of the Illinois Attorney General's Position That State Prisoners Must Disregard Rules Promulgated by the State Supreme Courts

In this case, the Illinois Attorney General seeks to have the federal courts intervene in the establishment of state appellate court rules and effectively overturn the system of state supreme court review set up by the Illinois legislature and the Illinois Supreme Court pursuant to the Illinois Constitution.

Article VI, Section 1 of the Illinois Constitution provides that: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Article VI, Section 16 states, in pertinent part, that "The Supreme Court shall provide by rule for expeditious and inexpensive appeals."

The Illinois legislature has explicitly provided that the Illinois Supreme Court has the power to "make rules of pleading, practice and procedure." 735 ILCS 5/1-104.

The Illinois Supreme Court exercised its power to set practice and procedure by adopting Ill.S.Ct.R. 315(a). That rule states that the criteria used by the Illinois Supreme Court in determining whether to grant a petition for leave to appeal include "the general importance of the question presented; the existence of a conflict be-

tween the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." *Boerckel*, 135 F.3d at 1200; JA 26-27. Although Ill. S.Ct.R. 315(a) states that whether a petition for leave to appeal will be granted "is a matter of sound judicial discretion," the statement of the factors that may be considered in determining whether to grant review effectively puts petitioners on notice that the Illinois Supreme Court will exercise its discretion to resolve questions of law for the lesser state courts, but will not exercise its discretion to review the application of the law to individual cases.

As previously discussed, the only Illinois appellate court to address the issue concluded that a petition for leave to appeal to the Illinois Supreme Court is not the kind of proceeding to which application of the doctrine of waiver is appropriate. *People v. Edgeworth*, 30 Ill. App. 3d 289, 294, 332 N.E.2d 716, 720 (1st Dist. 1975). Thus, the Illinois Attorney General is also effectively asking that this Court overrule an Illinois appellate court's decision on whether Illinois law requires the presentation of issues in a petition for leave to appeal to the Illinois Supreme Court on pain of forfeiture.

The conflict between the position urged by the Illinois Attorney General's Office and principles of federalism did not escape the Seventh Circuit's notice. The Seventh Circuit stated:

We also note that requiring petitioners to argue all of their claims to the state supreme court would turn federalism on its head. If a state has chosen a system that asks petitioners to be selective in deciding which claims to raise in a petition for leave to appeal to the state's highest court, we seriously question why this Court should require the petitioner to raise all claims to the state's highest court if he hopes to request

habeas review. The exhaustion requirement of § 2254 does not require such a result.

Boerckel, 135 F.3d at 1201; JA 37.

Neither federalism nor comity is offended by the result reached by the Seventh Circuit. However, the result urged by the Attorney General would do great violence to the principle of comity. Incredibly, the Attorney General argues that "it is irrelevant whether Illinois considers it necessary that petitioners raise every possible claim of error in order to exhaust their remedies."³ Pet. Brf. 24. This Court's prior decisions show that the Attorney General is simply wrong. See *James v. Kentucky*, 466 U.S. 341, 348-51 (1984); *County Court of Ulster County, N.Y. v. Allen*, 422 U.S. 140, 147 (1979); *Murray v. Carrier*, 477 U.S. 478, 490-91 (1986); *Coleman v. Thompson*, 501 U.S. 722, 748-49 (1991).

Ignoring Ill.S.Ct.R. 315(a), the Attorney General argues that a rule requiring a prisoner to raise claims in a petition for discretionary review before presenting them in a federal habeas petition is "desirable" because it will encourage prisoners to present all their claims to the state's highest court and "may obviate the need for some cases or issues to even come to federal court." Pet. Brf. 17-18. The Attorney General also argues that it would not be unduly burdensome to require prisoners to present

³ The Attorney General does not contend that state law requires that a claim be presented in a petition for leave to appeal to avoid forfeiture of the claim under state law. The Attorney General's argument that state law is irrelevant represents an implicit acknowledgment that the position of the Illinois Attorney General is in conflict with state law. Clearly, the Illinois Supreme Court has an interest in having its rules respected. That interest is not served by the position urged by the Illinois Attorney General. In this case, the interests of Boerckel and the state are in alignment since he followed the state's rule.

all of their claims in a petition for discretionary review to the state supreme court. Pet. Brf. 21.

The Attorney General's arguments regarding how desirable or burdensome it would be to have a different rule than the one adopted by the Illinois Supreme Court misconceive the way in which federal habeas corpus law depends upon and fortifies state law. The State of Illinois has decided not to employ its highest court as a general court of error. Illinois has chosen, instead, to rely on its intermediate appellate courts to correct most trial errors and to reserve the state supreme court for questions that have broad significance. Accordingly, in deference to state prerogatives, this Court should not fashion a federal scheme that will require prisoners to disregard the rule adopted by the Illinois Supreme Court. The Attorney General's position is flatly inconsistent with the comity owed to the State of Illinois, the Illinois Constitution, Illinois law and the rule adopted by the Illinois Supreme Court.⁴

⁴ The Attorney General also argues that the rule it proposes would not create a trap for unwary inmates, a concern expressed by the Seventh Circuit in *Hogan v. McBride*, 74 F.3d 144, modified on rehearing, 79 F.3d 578 (7th Cir. 1996) and in this case, *Boerckel*, 135 F.3d at 1202, JA 38. Pet. Brf. 31. The Attorney General essentially argues that although there is no right to counsel on discretionary review, prisoners can copy the claims raised by counsel in the direct appeal so that "there is little risk that an unrepresented petitioner will be unable to present the perfected claims to the state's highest court". Pet. Brf. 31. The Attorney General apparently assumes that prisoners like Mr. Boerckel, who has an IQ of approximately 70 and a longstanding reading defect (see *People v. Boerckel*, 68 Ill. App. 3d 103, 111, 385 N.E.2d 815, 821 (5th Dist. 1979)), will have the assistance of good jailhouse lawyers in preparing their petitions for discretionary review. The history of this case undermines that assumption. Boerckel's *pro se* petition for a writ of habeas corpus ignored the issues that had been preserved for federal habeas review and presented numerous issues that are not cognizable in habeas corpus. (Record 1) After a preliminary review of the case, the district court appointed counsel with directions that counsel prepare and file an amended petition. (Record 38)

Requiring defendants to include all possible claims in petitions for leave to appeal to the state supreme courts without regard to either the state's criteria for determining what issues to review or state caselaw on the effect of failing to include a claim in a petition for leave to appeal would offend the principle of comity. As the Eleventh Circuit has stated, the requirements of 28 U.S.C. § 2254 "are rooted in the doctrine of comity and should not be so construed as to burden the state system with meaningless petitions for relief to forums which are not intended by state law to consider them." *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (quoting *Williams v. Wainwright*, 452 F.2d 775, 777 (5th Cir. 1971)). See also *Smith v. White*, 719 F.2d 390 (11th Cir. 1983) (following *Williams v. Wainwright*, 452 F.2d 775, 777 (5th Cir. 1971)); *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) ("concerns of comity are best met by not requiring fruitless and burdensome petitions").

In addition to adopting rules, such as Ill.S.Ct.R. 315(a), several state supreme courts have made it clear in their published opinions that they have chosen not to be general courts of error. The Supreme Court of South Carolina has stated:

We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of *certiorari* upon the Court of Appeals' denial of relief in order to exhaust all available state remedies. We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and *certiorari* following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.

In Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454 (S.C. 1990) (footnote omitted). See also *State v. Sandoz*, 161 Ariz. 157, 777 P.2d 220 (Ariz. 1989) (holding that claims that do not justify state supreme court review under Ariz.R.Crim.P. 32.1 are exhausted when decided by the Court of Appeals); *Freeman v. Commonwealth*, 697 S.W.2d 133 (Ky. 1985) (finding that where the only basis for petitioning for discretionary review was to preserve issue for federal review, petition was frivolous and justified sanctions).

Adoption of the position urged by the Attorney General would have the undesirable effect of encouraging prisoners in Illinois to disregard the factors set forth in Ill.S.Ct.R. 315(a) in selecting issues to present in a petition for leave to appeal. This result comes about because, under the approach urged by the Attorney General, a prisoner who respected Ill.S.Ct.R. 315(a) and presented only those issues that comported with the factors set out in Rule 315(a) would lose the right to present any other issues in federal habeas proceedings. By cutting off habeas review in a case such as this where the prisoner has abided by the state's procedural rules, this Court would be inviting prisoners to ignore state procedural rules in order to preserve the possibility of habeas review. Such a decision would be inconsistent with this Court's prior procedural default cases which sent a clear message that state prisoners should litigate responsibly and comply with state procedural rules. See, e.g., *James v. Kentucky*, 466 U.S. 341 (1984); *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140 (1979); *Murray v. Carrier*, 477 U.S. 478 (1986); *Coleman v. Thompson*, 501 U.S. 722 (1991).

The Illinois Supreme Court has orchestrated a sensible system of judicial review, sensitive to the serious claims that litigants raise, but cognizant of the sheer volume

of cases and claims.⁵ The system adopted by the Illinois Supreme Court channels relatively routine fact-sensitive questions to the intermediate appellate courts, reserving the supreme court for issues of broader significance. It should be respected.

E. Prisoners Should Not Be Required to Petition for Discretionary Supreme Court Review of General Claims of Error, Especially When a State Rule Discourages Such a Practice, in Order to Exhaust Their Claims

As noted at the outset of this brief, this case is about procedural default, not exhaustion. The Attorney General's brief acknowledges that Boerckel cannot present his remaining claims to the Illinois Supreme Court. Nonetheless, it should be pointed out that the Attorney General's argument that a prisoner must present a claim in a request for discretionary review in order to exhaust the claim is incorrect.

In *Fay v. Noia*, this Court determined that the failure of a prisoner to seek *certiorari* from this Court does not bar the prisoner from seeking federal habeas relief. *Fay v. Noia*, 372 U.S. 391, 435 (1963), *overruled on other grounds*, *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *abrogated by Coleman v. Thompson*, 501 U.S. 722 (1991). When a state sets up a level of discretionary review similar to that employed by this Court, the effect of not seeking discretionary review from the state court should be no different than the effect of not seeking discretionary review in this Court.⁶

⁵ In 1997, more than half of the filings in the Illinois Supreme Court, 1,848 out of 3,591, were petitions for leave to appeal. Annual Report of the Illinois Courts Statistical Summary—1997 p. 15, figure 1.

⁶ The Attorney General implies that the Seventh Circuit's reliance on the similarity of Illinois' system of discretionary review and this Court's *certiorari* procedure is flawed because only review in the Illinois Supreme Court can be viewed as a state remedy for

The Attorney General argues that this case is an exception to the rule that federal habeas review is available when a state court has not made it clear that its decision rests on an independent and adequate state ground discussed in a footnote of this Court's opinion in *Coleman v. Thompson*, 501 U.S. 722 (1991). Pet. Brf. 15. This case, however, has nothing to do with the exception discussed in footnote 1 of the *Coleman* opinion. The exception noted in *Coleman* is intended to ensure that prisoners are not allowed to manufacture ambiguity by manipulative litigation in the state courts. See *Coleman*, 501 U.S. at 735, n.1 and accompanying text. Nothing of that kind occurred in this case. There is no ambiguity here about whether the intermediate appellate court denied the claims in this case on the basis of default or on the merits. The intermediate appellate court denied Boerckel's claims on the merits. In addition, footnote 1 of *Coleman* refers to a situation where the prisoner can no longer present his claims to a court to which he "would be required to present his claims in order to meet the exhaustion requirement." But the fact that Illinois discourages litigants from presenting all of their claims to the Illinois Supreme Court is evidence that presentation of claims to the Illinois Supreme Court is not required for exhaustion.⁷ *Boerckel*, 135 F.3d at 1200; JA 34.

A prisoner who has fairly presented his claims to the state courts in the manner prescribed by the state should

exhaustion purposes. Pet. Brf. 24-25. The Attorney General's argument misapprehends the analogy drawn by the circuit court. The point is that both the Illinois Supreme Court and this Court explicitly discourage litigants from seeking review of all manner of claims and thus screen the great mass of cases for those that have wider significance and thus warrant treatment by the final referee. That analogy is perfectly sound.

⁷ The Attorney General's brief recognizes that if Boerckel filed a state post-conviction petition raising the claims now at issue, the petition would be denied not on the basis of procedural default, but on the basis of redundancy. Pet. Brf. 18.

be deemed to have exhausted his remedies. Boerckel abided by the state's rules. As this Court has previously stated:

It has been settled since *Ex Parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. ss 2254(b) and (c), reflects a policy of federal-state comity. . . . It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.

Picard v. Connor, 404 U.S. 270, 275 (1971) (citations omitted). See also *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1621-22 (1998).

28 U.S.C. § 2254(c) provides that: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." Under the plain language of 28 U.S.C. § 2254(c), claims are exhausted if the petitioner does not have the "right," under state law, to raise the issue.

By definition, a system of discretionary review does not grant a petitioner the "right" to present a claim. Rather, petitioner has, at most, the "right" to attempt to persuade the state supreme court that petitioner's claim justifies that court's review. When a petitioner's claim does not comport with any of the factors a state supreme court has formally stated it considers in deciding whether to grant review, petitioners may not even have a good faith basis for arguing that the claim merits supreme court review. Because there is no right to file a frivolous petition, there will be some cases where there is no "right" to seek discretionary review.

This Court has rejected a narrow reading of 28 U.S.C. § 2254(c) that would "preclude a finding of exhaustion if there exists any possibility of further state-court review." *Castille v. Peoples*, 489 U.S. 346, 350 (1989) (citing *Brown v. Allen*, 344 U.S. 443, 448-49, n.3 (1953)). Instead, this Court has observed that it is "well settled that 'once [a] federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.'" *Castille*, 489 U.S. at 351 (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

In *Castille v. Peoples*, this Court concluded that the presentation of an issue in a petition for allocatur to the state's supreme court was not fair presentation for exhaustion purposes because the merits would only be considered if there were "special and important reasons therefor." *Castille*, 489 U.S. at 351 (quoting Pa. Rule App. Proc. 1114).

As this Court stated in *Wilwording v. Swenson*, 404 U.S. 249 (1971) (per curiam), "[t]he exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, 404 U.S. at 250 (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963), overruled on other grounds, *Wainwright v. Sykes*, 433 U.S. 72 (1977), and abrogated by *Coleman v. Thompson*, 501 U.S. 722 (1991)). *Wilwording v. Swenson* rejected the idea that state inmates had to invoke "any number of possible alternatives to state habeas" before filing a federal habeas petition, observing that whether the State would have heard the claims under any of the proposed alternative proceedings "is a matter of conjecture." *Wilwording v. Swenson*, 404 U.S. 249, 249-50 (1971).

Petitions for discretionary review to a state supreme court are analogous to Pennsylvania's petition for allocatur discussed in *Castille v. Peoples* and, as in *Wilwording v. Swenson*, whether such a petition would result

in review of the claims "is a matter of conjecture." Consistent with *Castille v. Peoples* and *Wilwording v. Swenson*, this Court should hold that the presentation of an issue in a petition for discretionary review by a state supreme court is not necessary to fairly present the issue to the state courts.

As the Eighth Circuit concluded in *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994), the right to raise an issue referred to in 28 U.S.C. § 2254(c) "means more than a mere opportunity to seek leave to present an issue; it means a realistic, practical chance to present an issue and have it considered on the merits."

The fact that Illinois discourages litigants from raising all possible claims is evidence that Illinois does not consider it necessary to raise all possible claims to comply with exhaustion requirements. *Boerckel*, 135 F.3d at 1200; JA 34. In fact, a state's adoption of a system of guided discretionary review which channels routine claims of error to the intermediate appellate courts and reserves the resources of the state's highest court for questions of broad significance could fairly be viewed as a waiver of the state's right to have every claim of error presented to the state's highest court.⁸ Moreover, as the Seventh Circuit noted, contrary to the Attorney General's contention, its holding would not obliterate any opportunity for a state's supreme court to protect federally secured rights since presenting a claim to the state's supreme court cannot hurt and could potentially help the defendant. *Boerckel*, 135 F.3d at 1201; JA 37.

The Attorney General's argument that requiring the presentation to the Illinois Supreme Court of all possible claims, a practice Illinois Supreme Court Rule 315(a) is

⁸ Clearly, some state supreme courts consider it beneficial to waive the right to be presented with every claim of error. See *In Re Exhaustion of State Remedies in Criminal and Post-Conviction Cases*, 321 S.C. 563, 471 S.E.2d 454 (S.C. 1990); *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (Ariz. 1989).

obviously intended to discourage, will aid judicial efficiency is without merit. Judicial efficiency would in fact be hampered by the position urged by the Attorney General because it would require prisoners in Illinois to burden the Illinois Supreme Court with fact-intensive claims that the Illinois Supreme Court has already determined do not merit supreme court review. Presentation of the types of claims the Illinois Supreme Court is not intended to hear in a petition for leave to appeal is simply a waste of the resources of the supreme court and the parties.⁹

Where, as in this case, a state has adopted a system intended to channel general claims of error to the intermediate state appellate courts while reserving the state supreme court's resources for questions of broader significance, requiring prisoners to petition the state supreme court to review general claims of error simply burdens the state supreme courts for little or no benefit to the federal courts. Consequently, the Seventh Circuit was correct in concluding that "an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right." *Boerckel*, 135 F.3d at 1200; JA 34.

⁹ It should also be observed that the Illinois Attorney General's attempt to override the system of supreme court review set up by the Illinois Supreme Court is inconsistent with the separation of powers doctrine explicitly set out in the Illinois Constitution. Article II, Section 1 of the Illinois Constitution provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

CONCLUSION

Where a state has established a system of discretionary review whereby general claims of error are channeled to the intermediate appellate courts and the resources of the state supreme court are reserved for questions of broad significance, prisoners should not be penalized for respecting the state's rules in formulating their petitions for discretionary review.

Because it would violate principles of comity and federalism to require a state prisoner to disregard a state procedural rule promulgated by the Illinois Supreme Court, pursuant to the Illinois Constitution and Illinois statute, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.

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No. 97 - 2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM D. O'SULLIVAN,

v.

Petitioner,

DARREN BOERCKEL,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit**

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1588

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES	ii
----------------------------	----

ARGUMENT:

THE EVOLUTION OF THE REMEDY OF <i>HABEAS CORPUS</i> , IN GENERAL, AND THE DOCTRINE OF EXHAUSTION, IN PARTI- ULAR, JUSTIFY THE ENFORCEMENT OF A RULE REQUIRING PETITIONERS TO RAISE THEIR CLAIMS TO THE HIGHEST COURT OF THE STATE ON DIRECT AP- PEAL IN ORDER TO PRESERVE THOSE CLAIMS FOR FEDERAL COLLATERAL RE- VIEW	1
---	---

A. The Court of Appeals' Holding Conflicts With Principles of Federalism and Com- ity	1
---	---

B. The Rule Proposed By O'Sullivan Would Be Consistent With This Court's Recent Precedents In <i>Habeas Corpus</i> Law	11
--	----

CONCLUSION	12
------------------	----

TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993)	10
<i>Castille v. Peoples</i> , 489 U.S. 436 (1989)	3, 4
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	8
<i>Fay v. Noia</i> , 372 U.S. 391 (1963)	6
<i>Hogan v. McBride</i> , 74 F.3d 144 (7th Cir.), modified on reh'g denied, 79 F.3d 578 (7th Cir. 1996)	7, 8
<i>Jennison v. Goldsmith</i> , 940 F.2d 1308 (9th Cir. 1991) (<i>per curiam</i>)	2, 3
<i>McCleskey v. Zant</i> , 499 U.S. 489 (1991)	3
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	5
<i>People v. Edgeworth</i> , 30 Ill.App.3d 289, 332 N.E.2d 716 (1st Dist. 1975)	6
<i>People v. Smith</i> , 93 Ill.2d 179, 442 N.E.2d 1325 (1982)	5
<i>People v. Toolate</i> , 101 Ill.2d 301, 461 N.E.2d 987 (1984)	5
<i>People v. Woods</i> , 184 Ill.2d 130, 703 N.E.2d 35 (1998)	5
<i>Rodriguez v. Peters</i> , 63 F.3d 546 (7th Cir. 1995)	8

<i>State v. Sandon</i> , 161 Ariz. 157, 777 P.2d 220 (Ariz. 1989)	1
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	10
 Statutes and Rules	
28 U.S.C. § 2254	3, 4
28 U.S.C. § 2254(c)	3
725 ILCS 5/122-1 <i>et seq.</i>	6
Illinois Supreme Court Rule 315	1, 4, 7, 9
Illinois Supreme Court Rule 315(a)	4, 5

ARGUMENT

THE EVOLUTION OF THE REMEDY OF *HABEAS CORPUS*, IN GENERAL, AND THE DOCTRINE OF EXHAUSTION, IN PARTICULAR, JUSTIFY THE ENFORCEMENT OF A RULE REQUIRING PETITIONERS TO RAISE THEIR CLAIMS TO THE HIGHEST COURT OF THE STATE ON DIRECT APPEAL IN ORDER TO PRESERVE THOSE CLAIMS FOR FEDERAL COLLATERAL REVIEW.

A. The Court of Appeals' Holding Conflicts With Principles of Federalism And Comity.

Boerckel spends virtually his entire brief focusing on state law, specifically, Illinois Supreme Court Rule 315, to support the claim that a *habeas* petitioner need not have brought his *habeas* claims on direct appeal in a petition for discretionary review to the state's highest court. As will be shown, Boerckel errs in focusing on state law to answer the exhaustion/default question presented in this case, errs in his interpretation of Illinois discretionary review, and is in no position to articulate the complaints which he raises regarding O'Sullivan's argument.

The flaw in Boerckel's focus on state law is perhaps best exemplified by his reliance on cases such as *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (Ariz. 1989). (Resp.'s Br. at 16). In that case, following a federal court dismissal of a *habeas* petition for failure to exhaust state court remedies, Sandon filed a petition to review the claims in the Arizona Supreme Court in order to exhaust state remedies. The Arizona Supreme Court dismissed the petition on the ground that Sandon need not present the claims to that court in order to exhaust state remedies. *Sandon*, 777 P.2d at 221. However, in a later decision, the United States Court of Ap-

peals held that such a state court declaration may not dictate for federal *habeas* courts whether exhaustion of state remedies has occurred. *Jennison v. Goldsmith*, 940 F.2d 1308 (9th Cir. 1991) (*per curiam*). Confronted with a claim based on *Sandon*, the *Jennison* court rejected the claim and found as follows:

The Arizona Supreme Court has confused review as of right under state law with "the right under the law of the state to raise" an issue within the meaning of the federal habeas statute. 28 U.S.C. § 2254 (1988). While *Jennison* does not have an appeal as of right to the Arizona Supreme Court [citation omitted], he does have the right to raise before the Arizona Supreme Court the issue he seeks to raise in federal habeas[.] [Citations omitted].

Jennison, 940 F.2d at 1310.

Boerckel raises essentially the same claim as those Arizona petitioners when he asserts that "discretionary review does not grant a petitioner the 'right' to present a claim." (Resp.'s Br. at 21). In like manner, *Amicus Curiae* describes the filing of leave applications in discretionary courts as an "arid ritual and empty formality" for which review will rarely be granted. (*Amicus Curiae* Br. at 8). Such a claim is insulting to the high courts of the states, and insulting to this Court, as well. Under Boerckel's apparent theory, if a petitioner raises a particular claim in a federal *habeas* petition and simultaneously raises that same claim in a state petition for discretionary review, the government should never prevail on a motion to dismiss the *habeas* petition for failure to exhaust state court remedies. This would be an absurd result, contrary to notions of federalism and comity, since the petitioner potentially could obtain relief in the state courts.

In *Jennison*, the court found that, while the state may determine what remedies are available to a prisoner alleging incarceration in violation of federal law, it is federal law which determines the sufficiency of exhaustion of state remedies. *Jennison*, 940 F.2d at 1311 n.4. O'Sullivan maintains that such a construction best comports with 28 U.S.C. § 2254(c) and fosters interests of federalism and comity.

Simply put, if an issue is important enough to warrant inclusion in a federal petition for a writ of *habeas corpus*, then it is important enough to first be presented to the state's highest court. If a claim alleges error of federal constitutional magnitude, as required by 28 U.S.C. § 2254, then every state court that could conceivably grant relief on the claim should have the initial opportunity to do so. See *McCleskey v. Zant*, 499 U.S. 489, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.") Even under Boerckel's interpretation of Illinois Supreme Court Rule 315, a *bona fide* future *habeas* claim is sufficiently significant to warrant inclusion in a petition for leave to appeal.

Both Boerckel and *Amicus Curiae* seek to rely on *Castille v. Peoples*, 489 U.S. 436 (1989), in support of the claim that presentment to an intermediate state appellate court alone should be deemed fair presentment for federal *habeas* purposes. They do not rely on the holding in *Castille*, but rather on a portion of the rationale for the holding. This Court described the issue presented in *Castille* as "whether the presentation of claims to a State's highest court on discretionary

review, without more, satisfies the exhaustion requirements of 28 U.S.C. § 2254." *Castille*, 489 U.S. at 349. The Court found that it did not. Accordingly, the actual holding of that case offers no support for Boerckel's position.

O'Sullivan acknowledges that, as part of the rationale for its holding against the respondent in *Castille*, this Court relied on a Pennsylvania rule of appellate procedure which, as quoted in the decision, is arguably similar to a portion of Illinois Supreme Court Rule 315. That fact should not lead to the conclusion, suggested by Boerckel and *Amicus Curiae*, that presentation to an intermediate state appellate court alone is sufficient to exhaust state remedies. First, Illinois Supreme Court Rule 315 does not define that court's jurisdiction as narrowly as the Pennsylvania rule quoted in *Castille*. However, even were it otherwise, the rationale expressed in *Castille* should not dictate the result Boerckel seeks. O'Sullivan does not contest the holding of *Castille* that the initial presentation of a claim in a discretionary forum does not amount to fair presentation for purposes of *habeas* review. It does not follow, however, that raising a claim only where there is an appeal as of right is fair presentation.

In his extensive argument on the point, Boerckel mischaracterizes Illinois Supreme Rule 315. The Rule provides as follows:

Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to

be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Illinois Supreme Court Rule 315(a). In his brief, Boerckel fails to acknowledge the complete language of the rule set forth above. More specifically, he ignores the Illinois Supreme Court's explicit pronouncement that the listed factors "neither control[] nor measure[] the court's discretion." This language unequivocally states that the specified factors are not to be viewed as an exhaustive list.

Further, Boerckel offers no support for his conclusion that the Illinois Supreme Court would not entertain claims such as those which he failed to raise in his discretionary appeal. In fact, the Illinois Supreme Court, on discretionary review, has both entertained and granted relief on the types of claims which Boerckel chose not to raise in his petition for leave to appeal. *People v. Toolate*, 101 Ill.2d 301, 461 N.E.2d 987 (1984) (Defense petition for leave to appeal allowed; reversal of conviction for insufficient evidence); *People v. Woods*, 184 Ill.2d 130, 703 N.E.2d 35 (1998) (Defense petition for leave to appeal allowed; reversal of conviction and remand premised on finding that confession was involuntary); *People v. Smith*, 93 Ill.2d 179, 442 N.E.2d 1325 (1982) (Defense petition for leave to appeal allowed; reversal and remand for invalid waiver of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)). Given these examples, it is evident that the Illinois Supreme Court does, indeed, address fact-specific questions.

Boerckel also errs in his conclusion as to how Illinois courts view the failure to raise a claim on discretionary review. He cites *People v. Edgeworth*, 30 Ill.App.3d 289, 332 N.E.2d 716 (1st Dist. 1975), for the proposition that "a petition for leave to appeal to the Illinois Supreme Court is not the kind of proceeding to which application of the doctrine of waiver is appropriate." (Resp.'s Br. at 12). He argues that, since the absence of a claim from a petition for leave to appeal would not result in forfeiture under state law, it similarly cannot result in forfeiture for federal *habeas corpus* purposes. (*Id.*). However, he is simply incorrect.

It is true that, for purposes of collateral attack under the Illinois Post-Conviction Hearing Act, (now 725 ILCS 5/122-1 *et seq.*), the denial of a petition for leave to appeal on direct appeal cannot result in a finding of *res judicata* effect for an issue which was raised in the petition or result in a finding of waiver of an issue which was not. *Edgeworth*, 332 N.E.2d at 720.¹ But that fact has no relevance to the issue presented at bar. The

¹ The *Edgeworth* court noted how the denial of *certiorari* by this Court "decides nothing as to the merits raised in the petition," and found a similar lack of meaning in a denial of leave to appeal by the Illinois Supreme Court. *Edgeworth*, 332 N.E.2d at 720. Boerckel seizes upon this similarity to argue that he should not, on pain of forfeiture, be forced to raise claims in a petition for discretionary review to the Illinois Supreme Court. (Resp.'s Br. at 7-8). At a later point in his brief, Boerckel cites *Fay v. Noia*, 372 U.S. 391, 435 (1963), in support of the same proposition. (Resp.'s Br. at 18) As argued in O'Sullivan's original brief, the similarity between these practices does not warrant the rule Boerckel proposes, because, unlike *certiorari* in this Court, allowing a state's highest court to review a state court conviction fosters interests of federalism and comity. (Pet.'s Br. at 24-25).

issue here is not whether Boerckel would have waived issues on state collateral attack by his failure to raise them in earlier discretionary review. It is whether he is precluded by that failure from raising those issues on federal collateral review, which statutorily requires exhaustion of state remedies. As argued in O'Sullivan's original brief and above, the question of exhaustion of state remedies should be answered by the federal courts.

Given Boerckel's substantial legal errors, a number of his arguments may be readily rejected. Boerckel contends that, should O'Sullivan prevail, the Illinois Supreme Court will be inundated with petitions for leave to appeal raising claims which Boerckel believes are not contemplated by Illinois Supreme Court Rule 315, and that this, in turn, will hamper judicial efficiency. (Resp.'s Br. at 8, 24). As previously discussed, Boerckel misperceives the scope of discretionary review under Rule 315. Moreover, from the statistics found in Boerckel's own brief, it appears that the Illinois Supreme Court already is so inundated. At footnote 5, Boerckel notes that, in 1997, more than one-half of the filings in that court were petitions for leave to appeal. (Resp.'s Br. at 17 n.5). At footnote 2, Boerckel includes a statistic of the small percentage of petitions actually allowed. (Resp.'s Br. at 8 n.2). This suggests that few petitioners before that court brought claims which met the criteria of Rule 315, as Boerckel characterizes them, even at a time when the law in the Seventh Circuit did not require *habeas* petitioners to bring such claims to the state's highest court in order to exhaust them. *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996).

In various sections of his brief, Boerckel raises the concept of procedural default, at one point claiming that procedural default, and not exhaustion, is the issue, (Resp.'s Br. 5, 13), and later allowing that exhaustion which ripens into default indeed might be the issue. (Resp.'s Br. 19-20). In the first instance, Boerckel's argument is driven by the assumption that state law controls whether or not a procedural default exists, and he claims that, since he properly complied with Illinois Supreme Court Rule 315, no procedural default exists. There are dual problems with that argument. First, it assumes that the independent and adequate state ground doctrine is the only means by which a petitioner can default a claim for federal *habeas corpus* purposes.² Such is not the case. Federal courts have found procedural default when a claim has never been presented to the state courts prior to a *habeas corpus* petition. *Rodriguez v. Peters*, 63 F.3d 546, 555 (7th Cir. 1995); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); (see Pet.'s Br. at 15-16). In that instance, there would have been no opportunity for the state courts even to have articulated a rule of default. Second, Boerckel's claim of lack of default is premised on what O'Sullivan already has shown to be an erroneous interpretation of Illinois Supreme Court Rule 315.

Boerckel's argument against a failure to exhaust ripening into a procedural default rests on his same erroneous interpretation of Illinois Supreme Court Rule 315, and must fail for the reasons already articulated. Moreover, even accepting Boerckel's interpretation of

² This appears to have been the rationale of the Seventh Court in its earlier decision in *Hogan v. McBride*, 74 F.3d at 146.

Illinois Supreme Court Rule 315, it is the federal courts, and not the state courts, which should determine whether resort to a particular state remedy is required for exhaustion purposes. O'Sullivan already has shown the desirability of discretionary review by a state's highest court for exhaustion purposes. Boerckel's argument to the contrary should be rejected.

O'Sullivan next maintains that Boerckel is hardly in the position to assert a number of his criticisms of the efficacy of state discretionary review. First, the very claims which he raised in his petition for leave to appeal do not even fit his own interpretation of Supreme Court Rule 315. Boerckel argues that the Rule "channels relatively routine fact sensitive questions to the intermediate appellate courts, reserving the supreme court for issues of broader significance" (Resp.'s Br. at 17), and that O'Sullivan's position would "burden the Illinois Supreme Court with fact-intensive claims." (Resp.'s Br. at 24). In his petition for leave to appeal, Boerckel raised the following three claims: (1) that the Appellate Court erred in holding that he was not under arrest prior to giving any incriminating statements to the police officers; (2) that the Appellate Court erred in holding that he waived the issue of whether or not he was denied a fair trial as a result of prosecutorial misconduct for failing to adequately specify it in his post-trial motion; and (3) that the Appellate Court erred in denying paragraph 14 of his motion for discovery, which requested any and all evidence developed on any other individuals that were possible subjects in the alleged crime in the indictment. (R.50, O'Sullivan's Exhibit E-Petition for Leave to Appeal, *People v. Boerckel*, No. 51757). These were mere requests that the Illinois Supreme Court apply settled law to the facts of an indi-

vidual case. They were not issues of particularly broad importance.

Moreover, contrasting the claims raised in Boerckel's petition for leave to appeal with those raised in his amended federal *habeas* petition further undermines his position. Boerckel posits that petitions for leave to appeal in Illinois are reserved for issues of broad significance. Similarly, the writ of *habeas corpus* is deemed an extraordinary remedy. See *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). Presumably, then, one would expect to see a similarity of claims in petitions filed in both courts. Such is not so here. Boerckel abandoned his state court claim of prosecutorial misconduct in his amended *habeas* petition, and persisted in asserting a Fourth Amendment claim, which almost certainly would be doomed under *Stone v. Powell*, 428 U.S. 465 (1976). On the other hand, Boerckel raised several constitutional claims in his amended *habeas* petition, three of which he had failed to raise on leave to appeal in state court, and one of which he never raised in the state courts. Boerckel should not be heard to complain that discretionary review is not a meaningful or desirable remedy for exhaustion purposes.

Finally, Boerckel is not in the position to complain regarding the lack of counsel on discretionary review. He criticizes O'Sullivan's argument that there is little risk that an unrepresented petitioner will be able to present perfected claims to a state's highest court. (Resp.'s Br. at 14 n. 4 (citing Pet.'s Br. at 31)). Since counsel prepared Boerckel's petition for leave to appeal, Boerckel never faced the dilemma suggested by the Court of Appeals. Moreover, his discussion regarding preparation of his federal *habeas* petition is entirely

beside the point, which was that virtually anyone could copy the already perfected claims from the intermediate appellate court brief for use in a petition for leave to appeal. O'Sullivan stands by the argument posited in his original brief on the point. (Pet.'s Br. at 31).

As O'Sullivan has already argued, the fact that Illinois may encourage selective presentation of issues is entirely consistent with the fact that federal *habeas corpus* is itself an extraordinary remedy. Boerckel's argument fails to recognize this correlation. Moreover, his argument is based on a faulty premise, because he focuses on state rather than federal law to answer the question of what is necessary to achieve exhaustion of state court remedies. Furthermore, his argument is premised on erroneous interpretations of Illinois law. Finally, his own contradictory actions in the case at bar serve to undermine his position.

The doctrine of exhaustion of state court remedies, rooted as it is in concerns of federalism and comity, requires that state courts be given the first opportunity to examine and correct federal constitutional errors in state court convictions. Allowing the highest state court to review a state court conviction advances these interests. Because the Court of Appeals' holding here conflicts with these well-settled principles, its decision should be reversed.

B. The Rule Proposed By O'Sullivan Would Be Consistent With This Court's Recent Precedents In *Habeas Corpus* Law.

Since Boerckel does not address the bulk of the points raised in this section of O'Sullivan's original brief, O'Sullivan will stand on his original arguments.

CONCLUSION

For the aforementioned reasons, and for the reasons explained in the Petitioner's original brief, Petitioner, William D. O'Sullivan, respectfully requests this Court to find that the United States Court of Appeals for the Seventh Circuit erred in holding that an individual who is in custody pursuant to a state criminal conviction may pursue claims in a federal *habeas* petition despite the fact that he failed to raise those claims on direct appeal in a petition for discretionary review to the state's highest court, and order the affirmance of the United States District Court's decision denying federal *habeas* relief.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1998

— ♦ —
WILLIAM D. O'SULLIVAN,
Petitioner,
v.

DARREN E. BOERCKEL,
Respondent.

— ♦ —
On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit
— ♦ —

BRIEF FOR THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT
— ♦ —

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QUESTION PRESENTED

This Court granted certiorari limited to the following question:

Whether a state prisoner may pursue claims in a federal habeas corpus petition which were not raised on direct appeal in a petition for discretionary review to the state's highest court.

TABLE OF CONTENTS

Interest of <i>Amicus Curiae</i>	1
Summary of Argument	2
ARGUMENT:	
STATE PRISONERS NEED NOT PRESENT FEDERAL CLAIMS TO STATES' HIGHEST COURTS ON PETITIONS FOR DISCRE- TIONARY REVIEW IN ORDER TO SATISFY THE FEDERAL HABEAS EXHAUSTION REQUIREMENT WHERE SUCH CLAIMS HAVE BEEN PROPERLY PRESENTED TO THE STATE COURTS ON DIRECT APPEAL AS OF RIGHT	3
Conclusion	11

TABLE OF AUTHORITIES

Cases

<i>Allen v. Attorney General</i> , 80 F.3d 569 (1 st Cir. 1996)	8
<i>Blackledge v. Perry</i> , 417 U.S. 21 (1974)	3
<i>Brewer v. Williams</i> , 430 U.S. 387 (1977)	9
<i>Buck v. Green</i> , 743 F.2d 1567 (11 th Cir. 1984)	5
<i>Castille v. Peoples</i> , 489 U.S. 346 (1989)	3

<i>DeBuono v. NYSA-ILA Medical and Clinical Serv.</i> , 520 U.S. 806 (1997)	10
<i>Dolny v. Erickson</i> , 32 F.3d 381 (8 th Cir. 1994)	7
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1991)	10
<i>Fay v. Noia</i> , 372 U.S. 391 (1963)	2
<i>Federal Deposit Insurance Corp. v. Meyer</i> , 510 U.S. 471 (1994)	9
<i>Frisbie v. Collins</i> , 342 U.S. 519 (1952)	3
<i>Gomez v. Acevedo</i> , 106 F.3d 192 (7 th Cir. 1997)	10
<i>Granberry v. Greer</i> , 481 U.S. 129 (1987)	3
<i>Harris v. Reed</i> , 489 U.S. 255 (1989)	3
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	9
<i>Lambrix v. Singletary</i> , 520 U.S. 518 (1997)	10
<i>Lynce v. Mathis</i> , 519 U.S. 433 (1997)	9
<i>McMillian v. Monroe County</i> , 520 U.S. 781 (1997) ...	10
<i>Miller v. Fenton</i> , 474 U.S. 104 (1985)	9
<i>Parker v. Ellis</i> , 362 U.S. 574 (1960)	7
<i>People v. Vance</i> , 76 Ill.2d 771, 390 N.E.2d 867 (1979)	5
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974)	5

IV

<i>Russell v. Rolfs</i> , 893 F.2d 1033 (9 th Cir. 1990)	8
<i>Smith v. White</i> , 719 F.2d 390 (11 th Cir. 1983)	7
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	3
<i>Stringer v. Black</i> , 503 U.S. 222 (1992)	10
<i>Thompson v. Keohane</i> , 516 U.S. 99 (1995)	9
<i>United States ex rel. Kling v. LaVallee</i> , 306 F.2d 199 (2d Cir. 1962)	7
<i>Williams v. Wainwright</i> , 452 F.2d 775 (5 th Cir. 1971)	7
<i>Withrow v. Williams</i> , 507 U.S. 680 (1993)	9
<i>Wright v. West</i> , 505 U.S. 277 (1992)	9

Miscellaneous

Ruggero J. Aldisert, <i>Winning on Appeal</i> (rev. ed. 1996)	6
<i>Annual Court Statistics Report</i> (1998)	6
<i>Annual Reports of the Clerk of the New York Court Of Appeals</i> (1991) & (1994)	6
<i>Annual Statistical Summaries of the Illinois Courts</i> (1994) & (1997)	6
Arthur Karger, <i>The Powers of the New York Court of Appeals</i> (3d ed. 1997)	6

V

James S. Liebman & Randy Hertz, <i>Federal Habeas Corpus Practice and Procedure</i> (3d ed. 1998) . . .	4
Robert L. Stern, <i>Appellate Practice in the United States</i> (2d ed. 1989)	5

**BRIEF FOR THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS *AMICUS
CURIAE* IN SUPPORT OF RESPONDENT**

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide — along with 78 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on many occasions. See, e.g., *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998); *Hohn v. United States*, 118 S.Ct. 1969 (1998).¹

¹ Both parties have consented to NACDL's appearance as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

SUMMARY OF ARGUMENT

Where state prisoners have properly presented their federal claims at trial and on direct appeal as of right, these claims need not be raised in a petition for discretionary review in the state's highest court. There are few appeals as of right to states' highest courts in noncapital criminal cases and discretionary leave applications are routinely made and just as routinely denied. (The Illinois Supreme Court has granted discretionary review in only <3%-6% of the noncapital criminal cases in which review has been sought since 1990; the figures in the high courts of California and New York are comparable).

States' highest courts routinely have limitations on their jurisdiction and broad discretion in what cases they may or must hear — limitations and discretion imposed by state constitutions, statutes or court rules — and litigants are on notice that these courts exercise their discretion to hear cases sparingly, not unlike the certiorari practice in this Court. Accordingly, discretionary appeal is no longer a meaningful state remedy "presently available" to most noncapital criminal appellants.

This Court should interpret the federal habeas corpus exhaustion doctrine as it did in *Fay v. Noia*, 372 U.S. 391 (1963) and relieve state prisoners of the obligation to seek discretionary review in their state's highest court before completing direct review as of right.

ARGUMENT

STATE PRISONERS NEED NOT PRESENT FEDERAL CLAIMS TO STATES' HIGHEST COURTS ON PETITIONS FOR DISCRETIONARY REVIEW IN ORDER TO SATISFY THE FEDERAL HABEAS EXHAUSTION REQUIREMENT WHERE SUCH CLAIMS HAVE BEEN PROPERLY PRESENTED TO THE STATE COURTS ON DIRECT APPEAL AS OF RIGHT

The doctrine of "exhaustion of state remedies" requires state prisoners to adequately present their federal claims to the state trial and appellate courts before seeking relief from the federal courts. 28 U.S.C. §2254(b) & (c). Nonetheless, "the general rule of exhaustion 'is not rigid and inflexible'" (*Granberry v. Greer*, 481 U.S. 129, 136 (1987)(quoting *Frisbie v. Collins*, 342 U.S. 519, 522 (1952)), nor is it jurisdictional. *Id.* at 131; *Castille v. Peoples*, 489 U.S. 346, 349-50 (1989); *Strickland v. Washington*, 466 U.S. 668, 679, 684 (1984).

In this case, the Court of Appeals correctly determined that a state prisoner need not raise his federal claims in a petition for discretionary review in the Illinois Supreme Court before seeking federal habeas corpus review so long as he has properly raised them in his direct appeal (as of right) in the Illinois Appellate Court. J.A. 26-38. Accordingly, he should be deemed to have properly exhausted his state judicial remedies with respect to his federal claims and not to have procedurally defaulted them in the Illinois state courts. *Harris v. Reed*, 489 U.S. 255, 258, 263 & n.9 (1989); *Blackledge v. Perry*, 417 U.S. 21, 23-24 (1974); *Castille v. Peoples*, 489 U.S. at 347-48, 350-51.

In *Castille v. Peoples*, this Court summarized the law relevant to adequate presentation of federal claims to the state courts as a precondition to federal habeas review. The Court held that where the federal claim was not asserted during appeal as of right in the state courts, its belated presentation for the first and only time in a petition for discretionary review in the state's highest court — where the merits ordinarily will not be considered “unless there are special and important reasons therefor” — did not constitute “fair presentation” of the claim in the state courts. 489 U.S. at 351.

This case, indeed, presents the mirror image of *Castille*. Here, respondent's federal claims as to sufficiency of the evidence, voluntariness of his confession and waiver of his *Miranda* rights all were properly asserted on his appeal to the Illinois Appellate Court — the intermediate appellate court to which he was entitled to present his claims as of right. J.A. 23, 24-25. However, these claims were not included among those he asserted when he sought leave to appeal to the Illinois Supreme Court.

Nonetheless, as the Court of Appeals correctly recognized, the exhaustion requirement is satisfied once the habeas petitioner takes advantage of whatever appeals *as of right* the state system affords — *e.g.*, all appellate procedures that require the state appellate courts to reach the merits of claims properly presented on appeal. See James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* §23.3b at nn.20-24 and accompanying text (3d ed. 1998). Discretionary appeals such as petitions for writ of certiorari or leave to appeal need not be pursued where their denial does not constitute a ruling on the merits. Compare *Harris v. Reed*, 489 U.S. at 263 & n.9 (claims properly exhausted in Illinois state courts where presented to trial and intermediate appellate courts even if discretionary review is not sought in Illinois Supreme

Court) with *People v. Vance*, 76 Ill.2d 771, 390 N.E.2d 867, 872 (1979)(Illinois Supreme Court denial of leave carries no connotation of approval or disapproval of intermediate appellate court's action).

Illinois Supreme Court Rule 315(a), which was modeled on this Court's former Rule 17 (now Rule 10), sets forth the factors that most states' highest courts consider:

The following, while neither controlling nor fully measuring the court's discretion, indicates the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

See also Robert L. Stern, *Appellate Practice in the United States* §6.7(c) at 156-59 (2d ed. 1989)(collecting standards of review from various states' highest courts).

In this respect, the Illinois Supreme Court's highly selective standard for granting review mirrors that of the North Carolina Supreme Court, which this Court considered in *Ross v. Moffitt*, 417 U.S. 600 (1974). There, it ruled that the highly discretionary nature of review in states' highest courts generally did not compel the provision of counsel for criminal defendants seeking to make leave applications notwithstanding it was warranted for criminal appeals as of right. *Id.* at 610-11, 615, 617. See also *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984)(Georgia Supreme Court's certiorari jurisdiction is extremely limited, being restricted by the Georgia Constitution

to "cases in the Court of Appeals which are of gravity or great public importance (citations omitted)"; Arthur Karger, *The Powers of the New York Court of Appeals* §§133 & 135(a) & (d)(3d ed. 1997)(with the exception of capital cases, the power of the Court of Appeals in noncapital criminal cases is limited by the New York State Constitution to questions of law, as distinguished from questions of fact or discretion).

The actual court statistics bear out the practical impact of this jurisdictional limitation. Between 1990 and 1997, the Illinois Supreme Court has granted leave to appeal in only <3%-6% of the noncapital criminal cases brought up to it seeking review. See Administrative Office of the Illinois Courts, 1994 & 1997 *Annual Statistical Summaries of the Illinois Courts* (Table 2). These figures are exactly comparable to the minuscule percentage of noncapital criminal leave applications granted by the states' highest courts of California and New York during the same period. See Administrative Office of the Courts, Judicial Council of California, *Annual Court Statistics Report* (1998)(Tables 5 & 6)(California Supreme Court granted 4%-6% of noncapital criminal leave applications filed between 1987-1997); 1994 & 1997 *Annual Reports of the Clerk of the New York Court of Appeals* (Appendix Tables 12 & 13)(New York Court of Appeals granted 3% of noncapital criminal leave applications filed between 1987-1994).²

Given the limitations on jurisdiction and the breadth of discretion of the states' highest courts nationwide — and the relative paucity of the number of cases in which review is actually granted — it is manifest that requiring state prisoners to continue to burden the states' highest courts with

² See also Ruggero J. Aldisert, *Winning On Appeal* §1.3 at 11-13 (rev. ed. 1996)(collecting statistics on civil and criminal leave applications granted by thirty four states' highest courts during 1990).

discretionary leave applications that are doomed to failure warrants the reproach that it is the state prisoners, not the state remedies, that are being exhausted. *Parker v. Ellis*, 362 U.S. 574, 582 (1960)(Warren, C.J., dissenting); *United States ex rel. Kling v. LaVallee*, 306 F.2d 199, 203 (2d Cir. 1962)(Friendly, J.)(accord).

Under analogous circumstances, the Eighth Circuit has held that criminal leave applications need no longer be made to the Minnesota Supreme Court to satisfy the exhaustion requirement where, in practice, less than 25% of the petitions for discretionary review are granted. *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994). See also *Williams v. Wainwright*, 452 F.2d 775, 776-77 (5th Cir. 1971)(unnecessary to seek review in Florida Supreme Court of intermediate appellate court's affirmance of a noncapital criminal conviction to satisfy exhaustion); *Smith v. White*, 719 F.2d 390, 392 (11th Cir. 1983)(unnecessary to seek review in Alabama Supreme Court); *Buck v. Green*, 743 F.2d at 1569 (unnecessary to seek review in Georgia Supreme Court).

The logic undergirding these decisions derives from that aspect of *Fay v. Noia*, 372 U.S. 391, 435-38 (1963) that still remains good law to this day — viz. state prisoners need not seek certiorari in this Court on their direct appeals before resorting to federal habeas review. See *Dolny*, 32 F.3d at 384. Here, where the Illinois Supreme Court has explicitly modeled its review standard on this Court's factors governing review by certiorari — and, indeed, grants review in comparably few cases — the same rule should apply for the same reason. As the Eighth Circuit observed in this regard (*id.* at 384):

We believe that "[t]he right ... to raise" an issue referred to in §2254 means more than a mere opportunity to seek leave to present an issue; it means

a realistic, practical chance to present an issue and have it considered on the merits.

Here, the Illinois Supreme Court's miserly exercise of discretion "offers no practical remedy that [the state prisoner] was required to exhaust under §2254 The requirements of this section are rooted in the doctrine of comity and should not be so construed as to burden the state system with meaningless petitions for relief to forums which are not intended by state law to hear them." *Williams v. Wainwright*, 452 F.2d at 777. See also *Russell v. Rolfs*, 893 F.2d 1033, 1037-38 (9th Cir. 1990) ("the word 'available' as used in 28 U.S.C. §2254(b) ... does not refer to an avenue that exists on a map but is closed permanently to the kind of vehicle being driven by the defendant").

State prisoners should not be put to the arid ritual and empty formality of filing leave applications in states' highest courts which, despite possessing technical jurisdiction, exercise it only rarely (*Dolny*) or are unlikely to entertain federal claims either because of *stare decisis* or because the claim calls for fact-intensive review. As the First Circuit has noted in this regard (*Allen v. Attorney General*, 80 F.3d 569, 573 (1st Cir. 1996)):

If *stare decisis* looms, that is, if a state's highest court has ruled unfavorably on a claim involving facts and issues materially identical to those undergirding a federal habeas petition and there is no plausible reason to believe that a replay will persuade the court to reverse its field, then the state judicial process becomes ineffective as a means of protecting the petitioner's rights. In such circumstances, the federal courts may choose to relieve the petitioner of the obligation to pursue available state appellate remedies as a con-

dition precedent to seeking a federal anodyne. (Citations omitted). The law, after all, should not require litigants to engage in empty gestures or to perform obviously futile acts.³

In this case, respondent sought to raise three issues that are properly cognizable on federal habeas review — and which must receive independent and plenary review at the district court level. Liebman & Hertz §2.4b at 22-32 (3d ed. 1998).⁴ Respondent attacked: (a) sufficiency of the evidence (*Jackson v. Virginia*, 443 U.S. 307 (1979); *Wright v. West*, 505 U.S. 277 (1992)), (b) voluntariness of his confession (*Withrow v. Williams*, 507 U.S. 680, 693-94 (1993); *Miller v. Fenton*, 474 U.S. 104, 112-13 (1985); *Thompson v. Keohane*, 516 U.S. 99, 109-13 (1995)(*dicta*)), and (c) adequacy of his waiver of *Miranda* rights (*Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Withrow*, 507 U.S. at 689-93).

All three issues contemplate the direct application of relatively unexceptionable federal legal principles to highly fact-intensive trial records. It calls for careful case-by-case adjudication, which invokes the reviewing court's law-applying — as opposed to law-making — function. Liebman & Hertz §2.4b at 32 (core difference between "courts with only appellate

3 See, e.g., *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997)(Court is "satisfied ... that exhaustion would have been futile" because Florida Supreme Court previously rejected claim in other cases and counsel for the state "has not suggested any reason why the Florida courts would have decided petitioner's case differently"); *Blackledge v. Perry*, 417 U.S. at 23-24 ("futility" found because North Carolina Supreme Court "had consistently rejected" similar claims).

4 A claim is "cognizable" if it comes "within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy." *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 476 (1994).

capacities and those that also have original (evidence-taking) capacities"). Indeed, there are some states' highest courts (*e.g.*, New York) which do not possess any jurisdiction to review facts at all.

Here, the Court of Appeals properly determined that the Illinois Supreme Court encourages its litigants to exercise issue selectivity and actively discourages raising every conceivable claim of error on leave applications. J.A. 32-38.⁵ It understood this as signifying that the Illinois courts do not consider it necessary to raise all claims in discretionary leave applications so long as they have been properly asserted in Illinois' intermediate appellate court on appeal as of right. This determination, which accords with a similar determination of another panel of the same court — *Gomez v. Acevedo*, 106 F.3d 192, 195-96 (7th Cir. 1997) is entitled to substantial deference by this Court. *See, e.g., Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) ("the courts of appeals and the district courts are more familiar than [Supreme Court]" with "procedural practices of the States"); *DeBuono v. NYSA-ILA Medical and Clinical Serv.*, 520 U.S. 806, 810-11 n.5 (1997) ("settled practice of according respect to the court of appeals' greater familiarity with issues of state law"); *McMillian v. Monroe County*, 520 U.S. 781, 786 & n.3 (1997) (because "jurisdiction of the [11th Circuit] Court of Appeals includes Alabama" and because "two of the three judges on the Eleventh Circuit's panel are based in Alabama", "we defer considerably to that court's expertise in

⁵ Indeed, given the selectivity of states' highest courts, as well as their function as the unreviewable final arbiter of state law (*Stringer v. Black*, 503 U.S. 222, 235 (1992)), it would be entirely appropriate for a litigant to seek review in the state's highest court of a potentially dispositive question of state law, otherwise unreviewable on federal habeas corpus, where his federal claims may otherwise still be heard in federal courts. *See, e.g., Estelle v. McGuire*, 502 U.S. 62 (1991) (errors of state law ordinarily are not cognizable on federal habeas review).

interpreting Alabama law").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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